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ocketed:
eptember 20, 1985

Title: Ohio Civil Rights Commission, et al, Appellants
v.
Dayton Christian Schools, Inc., et al.

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for appellant: McManus,Kathleen

Counsel for appellee: Ball,William Bentley

ntry	Date	Note	Proceedings and Orders
1	Sep 20 1985	G	Statement as to jurisdiction filed.
2	Sep 20 1985		Appendix of appellant OH Civil Rights Commn. filed.
3	Oct 23 1985		DISTRIBUTED. November 8, 1985
4	Oct 23 1985	X	Motion of appellees Dayton Christian Schools, et al. to dismiss or affirm filed.
5	Nov 7 1985	X	Reply brief of appellants OH Civil Rights Commission, et al. filed.
6	Nov 12 1985		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
			**********
8	Dec 23 1985		Order extending time to file brief of appellant on the merits until December 31, 1985.
9	Dec 24 1985		Joint appendix filed.
10	Dec 23 1985		Record filed.
11	Dec 20 1985		Record filed.
12	Dec 26 1985		Brief amicus curiae of American Jewish Congress filed.
13	Dec 30 1985		Brief amicus curiae of ACLU, et al. filed.
14	Dec 24 1985		Joint appendix filed.
15	Dec 24 1985		Brief of appellant OH Civil Rights Commission filed.
17	Jan 6 1986		Order extending time to file brief of appellee on the merits until February 3, 1986.
18	Jan 24 1986		Order further extending time to file brief of appellee on the merits until February 5, 1986.
19	Feb 4 1986		SET FOR ARGUMENT, Wednesday, March 26, 1986. (4th case)
20	Feb 3 1986		Brief amicus curiae of U.S. Catholic Conference filed.
21	Feb 5 1986		Brief amicus curiae of Natl. Jewish Comm. on Law & Public Affairs filed.
22	Feb 5 1986		Brief amicus curiae of American Jewish Committee, et al. filed.
23	Feb 5 1986		Brief amicus curiae of Council of Religious Freedom filed.
24	Feb 5 1986		Brief amicus curiae of Americans United for Separation of Church & State filed.
25	Feb 5 1986		Brief amicus curiae of General Conference of Seventh Day Adventists filed.
26	Feb 5 1986		Brief amicus curiae of Catholic League for Religious and Civil Rights etc. filed.
27	Feb 5 1986		Brief amicus curiae of Catholic Conf. of Ohio filed.
28	Feb 3 1986		Brief amicus curiae of Rutherford Inst., etc. et al. filed.
29	Feb 5 1986		Brief amicus curiae of Ass. Christian Conciliation Services filed.

App

o. 85-488-AFX

ntry	Date	Note	Proceedings and Orders
30	Feb 5 1986		Brief amicus curiae of Concerned Women of America filed.
31	Feb 10 1986		Brief of appellees Dayton Christian Schools, et al. filed.
32	Feb 5 1986		Brief amicus curiae of Gulf & Great Plains Legal Foundation filed.
34	Feb 18 1986		CIRCULATED.
35	Feb 14 1986		Brief of appellee Dayton Christian Schools filed.
36	Mar 10 1986	X	Reply brief of appellant OH Civil Rights Commn. filed.
37	Mar 26 1986		ARGUED.

JURISDICTIONAL

STATEMENT

JURISDICTIONAL

STATEMENT

85-488

Supreme Court, U.S.
FILED
SEP 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

In The
Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., et al.,
Appellees.

ON APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

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ATTORNEYS FOR APPELLANTS

QUESTION PRESENTED

Is the Ohio Civil Rights Commission precluded by the Free Exercise Clause or Establishment Clause of the First Amendment from investigating and conducting a hearing on a charge that a religiously affiliated school engaged in an unlawful discriminatory practice by terminating a teacher for the reason that she was pregnant and/or had consulted an attorney regarding the legality of her termination where the termination was based on religious beliefs?

PARTIES

The Appellants in this action are the Ohio Civil Rights Commission, Robert D. Brown in his capacity as Executive Director of the Ohio Civil Rights Commission, Rebecca K. Haley Ross in her capacity as Regional Director of the North-Southwest Regional Office of the Ohio Civil Rights Commission, Ronald C. Morgan and Clingan Jackson in their capacities as Commissioners of the Ohio Civil Rights Commission, and Rev. Phale D. Hale, Catherine Ellis, and Alyce Lucas as successor Commissioners of the Ohio Civil Rights Commission to Wade Franklin, III, Thomas A. Brown, and Thaddeus A. Garrett.

The Appellees are Dayton Christian Schools, Inc., Patterson Park Church, Christian Tabernacle, Claude E. Schindler, Jr., Stephen P. House, and his wife, Camillia House, and Paul Pyle.

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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., et al.,
Appellees.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit issued on June 26, 1985 is set forth in the Appendix (A-1) and is reported at 766 F.2d 932. The decision of the United States District Court for the Southern District of Ohio, Western Division, is also set forth in the Appendix (A-53) and is reported at 578 F. Supp. 1004.

JURISDICTION OF THIS COURT

This is an appeal from a judgment of the United States Court of Appeals for the Sixth Circuit entered on June 26, 1985, holding the Ohio Civil Rights Act unconstitutional as applied to Dayton Christian Schools. On remand, the United States District Court for the Southern District of Ohio, Western Division, entered a final judgment in favor of Appellees on August 13, 1985. This action was initiated by Appellees in the

district court by filing a complaint pursuant to 42 U.S.C. Section 1983 seeking declaratory and injunctive relief.

The Notice of Appeal was filed with the Sixth Circuit Court of Appeals on September 20, 1985, within 90 days of entry of the court of appeals' judgment. This appeal is taken, and jurisdiction conferred upon this Court, under 28 U.S.C. Section 1254(2).

If the Court determines that an appeal is not proper in this case, Appellant respectfully requests that this Jurisdictional Statement be considered as a petition for certiorari pursuant to 28 U.S.C. Section 2103.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Ohio Civil Rights Act, Ohio Revised Code Section 4112.01 *et seq.*, is set forth in full in the Appendix (A-132).

STATEMENT OF THE CASE

This case originated as a result of a charge of discrimination filed by Linda Hoskinson with the Ohio Civil Rights Commission, which enforces Ohio's laws against discrimination, Ohio Revised Code Section 4112.01 *et seq.* (the Ohio Civil Rights Act). Linda Hoskinson claimed that Dayton Christian Schools refused to renew her teaching contract for the following school year upon learning that she was pregnant, and that shortly thereafter she was summarily terminated in

retaliation for having consulted with an attorney concerning the non-renewal of her contract.

Linda Hoskinson had been employed by Dayton Christian Schools as an elementary school teacher since 1974. Dayton Christian Schools is a private non-profit corporation and provides education to both elementary and high school students. From its inception, Dayton Christian Schools has had a dominant religious purpose which permeates the administrative and substantive aspects of the school. This purpose is based on Biblical precepts and is pa.. of the school's goals and curriculum.

In January of 1979, Mrs. Hoskinson told the principal of Dayton Christian Schools, Mr. James Rakestraw, tha: she was pregnant. During this conversation, Mrs. Hoskinson expressed her strong desire to continue teaching at Dayton Christian Schools during the course of her pregnancy and the following year. Mr. Rakestraw indicated that he did not foresee a problem with her returning to work and offered "to look into" the matter.

Mr. Rakestraw discussed Mrs. Hoskinson's pregnancy with Mr. Claude Schindler, the Superintendent of Dayton Christian Schools, and on February 20, 1979, Mrs. Hoskinson received a memorandum informing her that her teaching contract would not be renewed for the following year. That memorandum stated in pertinent part:

> My concern. . .was. . .that as you will be a new parent. . .your teaching next year would be in contrast to the school's philosophy. As a school, we see the importance of the mother in the home during the early years of child growth.

This policy had never been previously formalized nor communicated to the school's employees.

In accordance with the school's Christian beliefs, each member of the board and the educational staff of Dayton Christian Schools is required to subscribe yearly to a Statement of Faith of religious precepts[1] and must be a member of a church having a doctrine which is in agreement therewith. The teachers at Dayton Christian Schools are also asked to be "scripturally sound" in their teaching, to lead exemplary Christian lives, and to adhere to a Biblical Chain of Command, which refers to a belief in a scripturally based authority structure. Mr. Schindler described what he believed to be the school's policy regarding new mothers in the following terms: "because of our desire to have a mother home with preschool age children, she would not be issued a contract for the upcoming year." Mr. Schindler testified that this belief is based on scriptural passages from the Bible.

Upon learning that Mr. Schindler would not permit her to return to work, Mrs. Hoskinson consulted an attorney con-

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[1]The Statement of Faith provides:

Each member of the Board of Directors and each member of the educational staff of the Corporation having accepted Jesus Christ as personal Savior, shall subscribe annually in writing to the following statement of Faith:

1. I believe the Bible to be the inspired and the only infallible authoritative Word of God.

2. I believe that there is one God, eternally existent in three persons: Father, Son, and Holy Spirit.

3. I believe in the deity of our Lord Jesus Christ, in His Virgin Birth, in His sinless life, in His miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in his personal return in power and glory.

4. I believe that man is sinful by nature and that regeneration by the Holy Spirit is essential for his salvation.

5. I believe in the continuing ministry of the Holy Spirt, by whose indwelling the Christian is enabled to live a Godly life.

6. I believe in the resurrection of both the saved and the lost. They who are saved unto eternal life and they who are lost unto eternal damnation.

7. I believe in the spiritual unity of believers of our Lord Jesus Christ.

8. I believe in the creation of man by the direct Act of God.

cerning the legality of the school's action. The attorney sent a letter to Mr. Schindler notifying him that the school's practices were potentially discriminatory, stating, specifically: "[t]o preclude my client from further employment on the basis of pregnancy and childrearing constitutes violations of both state and federal discrimination laws. . . ." Following receipt of this letter, a meeting was held with Mrs. Hoskinson, Mr. Schindler and Mrs. Rakestraw during which Mrs. Hoskinson was told she was suspended because she had gone outside the school to resolve her dispute. The following day, the governing board of Dayton Christian Schools met and discussed Mrs. Hoskinson's pregnancy and decided to discharge her. On March 27, 1979, Mr. Schindler came to Mrs. Hoskinson's home and told her she was fired. Mr. Schindler gave Mrs. Hoskinson a letter rescinding the February memorandum, and a letter notifying her that she was being terminated due to philosophical differences, as evidenced by her failure to follow the Biblical Chain of Command.[2]

On March 28, 1979, Mrs. Hoskinson filed a charge of discrimination based on sex with the Ohio Civil Rights Commission. Specifically, Mrs. Hoskinson alleged that the school had refused to renew her teaching contract because of her pregnancy, and had terminated her in retaliation for consulting an attorney.

The Ohio Civil Rights Commission duly notified Dayton Christian Schools of the filing of the charge and commenced a preliminary investigation pursuant to Ohio Revised Code Section 4112.05(B). As a result of its preliminary investigation, the Commission determined that it was probable that unlawful discriminatory practices had been engaged in by Dayton Christian Schools and the school was so notified. Having made a determination of probable cause, the Commission

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[2]Paragraph 13 of Mrs. Hoskinson's teaching contract provided:

> The Teacher agrees to follow the Biblical pattern of Matthew 18:15-17 and Galatians 6:1 and always give a good report. All differences are to be resolved by using Biblical principles — presenting a united front.

Mrs. Hoskinson was told it was her violation of this portion of her contract which precipitated her discharge.

attempted to "eliminate such practices by informal methods of conference, conciliation and persuasion." Ohio Revised Code Section 4112.05(B). When attempts at conciliation failed, the Commission issued a Complaint and Notice of Hearing, based on Mrs. Hoskinson's charge. The Complaint alleged that Dayton Christian Schools had discriminated against Mrs. Hoskinson for reasons not applied equally to all persons without regard to their sex, in violation of Ohio Revised Code Section 4112.02(A), and in retaliation for having opposed practices she reasonably believed to be unlawful under Ohio's laws against discrimination, in violation of Ohio Revised Code Section 4112.02(I).

Prior to the scheduled date of the Commission's hearing, the Appellees filed a Complaint in the United States District Court for the Southern District of Ohio, Western Division, seeking to enjoin the Ohio Civil Rights Commission from further investigating, and conducting a hearing upon, the charges filed by Mrs. Hoskinson. Pursuant to a motion for a preliminary injunction filed by the Appellees, the district court issued a temporary restraining order preventing the Commission from conducting further proceedings in the matter. The parties subsequently agreed to a consolidation of the hearing on the Appellees' motion for a preliminary injunction and a trial on the merits, pursuant to Fed. R. Civ.P.(a)(2).

In determining whether to grant a permanent injunction, the issue before the district court was whether the Ohio Civil Rights Commission could entertain jurisdiction to investigate and conduct a hearing on a charge of unlawful sex discrimination and retaliatory firing without impermissibly infringing on Appellees' asserted First Amendment rights to freedom of religion. The district court found that the statutory provisions of Ohio Revised Code Section 4112.01 *et seq.* were intended by the legislature to apply to employers such as Dayton Christian Schools, even though a pervasively religious environment was involved. Recognizing that the application of the statute to a religiously affiliated school would present some risk of state entanglement and interference with religious beliefs and practices, the district court carefully

balanced the respective interests of the parties. The court concluded that allowing the Commission to proceed with the hearing would not cause a substantial risk of impingement by the state on Appellees' exercise of their religious belief or an immediate threat of excessive government entanglement.

More specifically, the district court found the exercise of jurisdiction by the Ohio Civil Rights Commission in this matter would only "infringe incidently or minimally on Appellees' free exercise rights" and "any burden resulting is founded upon a compelling state interest in eliminating sex discrimination employment." (A-108). In this regard the court noted:

> For the most part, Plaintiffs will continue to be free to believe and to practice their belief in the internal resolution of differences. The Court concludes, therefore, that the OCRC investigation and hearing presently at issue and any occasional and as of yet uncertain future investigation and hearings on charges of sex discrimination and retaliatory employer action provide but a brief and infrequent imposition into Plaintiffs' belief that disputes be resolved internally.
>
> . . .
>
> Those who believe that the Bible requires the mother of young children to be at home and not work are left free to exercise or put into practice that religious belief. Nothing in Chapter 4112 would force any of the Plaintiffs themselves to act contrary to this belief. . . . Thus none of the parents, teachers, or administrators at DCS would themselves be forced to engaged in conduct violative of their religious beliefs were the proscriptions against sex discrimination in employment contained in Chapter 4112 brought to bear on DCS. Instead, all

> that would be asked of Plaintiffs is that they not take adverse employment action against a woman if she does not concur in their interpretation of what the Bible requires of a mother. (A-105-106).

Furthermore, the district court found that granting Dayton Christian Schools an exemption from Ohio Revised Code Chapter 4112 could seriously undermine the state's objective of eradicating discrimination. The court reasoned:

> Exposure to an education atmosphere wherein unlawful discrimination is practiced could have a substantial impact on the values these children eventually carry out into the world when they leave school. Furthermore, the cumulative impact on the state's goal of ending discrimination could be significant if comparable religiously oriented schools and places of business likewise sought and were to receive exemptions from the prohibitions contained in Chapter 4112. The exemption sought herein is neither so narrow nor unlikely of repetition that the Court need not be concerned about the likelihood of setting in motion what could well be a whole series of complaints from employers seeking exemptions from all or part of the anti-discrimination provisions contained in Chapter 4112, and, quite conceivably, the comparable proscriptions contained in Title VII. (A-110-111).

Utilizing the three-part test developed by this Court for determining if a statute runs afoul of the Establishment Clause, the district court concluded that the Ohio Civil Rights Acts has the secular purpose of eliminating unlawful discriminatory practices, does not have a primary effect of advancing or inhibiting religion, and that its application in the instant context would not result in excessive government entanglement in religion. Focusing on the entanglement factor, the district court noted that many of the concerns voiced by Appellees about state entanglement in religious freedoms were only possibilities. The only harm immediately threatened was any entanglement that could result from the state's attempt to investigate and to conduct a hearing on whether Dayton Christian Schools engaged in unlawful discriminatory conduct. The court concluded that whatever entanglements might result from this investigation and hearing "will be sufficiently limited in both length and the degree to which they intrude in the overall operation of the school, that any fears of excessive government entanglement are minimal." (A-118).

Finding exercise of jurisdiction by the Ohio Civil Rights Commission over the present dispute would not impermissibly infringe on Appellees' free exercise rights or result in excessive government entanglement in religion, the district court refused to grant the permanent injunction sought by Appellees.[3] Having been denied the permanent injunction, Dayton Christian Schools appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit found that the application of the Ohio Civil Rights Act to Dayton Christian Schools under the facts presented violated the First Amendment's guarantees of freedom of religion. It first concluded that the Act impaired the free exercise rights of the school and parents of students in the school by potentially forcing the school to reinstate a teacher whose status as a working mother would have made her a poor religious role model (in the school's and parents view), and who violated a tenet of the school's beliefs by contesting its sexually discriminatory practices. Based on these infringements and its perception of the statutory scheme as "highly coercive" (A-29), the appellate court found the burdens on Appellees' religious beliefs to be great.

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[3]Appellees also had asserted that the Ohio Civil Rights Act was unconstitutionally vague and overbroad. The district court rejected these arguments. (A-91,93). The Sixth Circuit did not address these issues because it found the Act unconstitutional as applied to Appellees. (A-4, note 5).

The court, however, recognized that the state, in pursuit of a compelling state interest, may burden a religious practice and acknowledged that the state's interest in eliminating discrimination is substantial and compelling. (A-36). Nonetheless, concluding that "accommodation of the religious beliefs in this case would not significantly interfere with the state's fulfillment of its goal of eradicating discrimination" and suggesting that there may be less drastic alternatives for accomplishing that goal, the Sixth Circuit found the state's interest did not justify "such a broad and onerous limitation." (A-37-38).

The Sixth Circuit also found an Establishment Clause violation. Although concurring with the lower court's conclusion that the statute has a secular purpose and does not have the effect of either advancing or inhibiting religion, the Sixth Circuit concluded that the application of the Ohio Civil Rights Act in the instant matter would foster excessive entanglement. The court concluded that inquiries into the hiring practices of Dayton Christian Schools would necessarily result in excessive church/state entanglement due to the issues of good faith and motivation involved, the pervasively religious nature of Dayton Christian Schools, the important role of teachers in fostering religious beliefs, and the fact that religious considerations are an integral part of Dayton Christian Schools' hiring practices.

Finding Appellees' First Amendment rights would be violated by allowing the Ohio Civil Rights Commission to assert jurisdiction over Dayton Christian Schools' employment practices premised on religious beliefs, the Sixth Circuit reversed the judgment of the district court, and held the Ohio Civil Rights Act unconstitutional as applied to Dayton Christian Schools.

THE QUESTION PRESENTED IS SUBSTANTIAL

The lower court's holding that a religiously affiliated school is immune from the application of Ohio's laws prohibiting sex discrimination as such laws relate to employment decisions which implicate religious beliefs is a decision of monumental import. The interests at stake in this case are interests of the highest order. The First Amendment's protection of religious belief "plainly rank[s] high 'in the scale of our national values'." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). On the other hand, the elimination of sex discrimination and the guarantee of freedom of personal choice in matters of family life are substantial and compelling values. *Roberts v. United States Jaycees*, ____U.S.____ , 104 S. Ct. 3244 (1984); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Not one of these values necessarily predominates. While the First Amendment "provides substantial protection for lawful conduct grounded on religious belief," certain governmental interests have been found by this Court to be "so compelling as to allow even regulations prohibiting religiously based conduct." *Bob Jones University v. United States*, ____U.S.____ , 103 S. Ct. 2017, 2034-2035 (1983) (elimination of racial discrimination); *United States v. Lee*, 455 U.S. 252 (1982) (assurance of mandatory participation in social security system); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (enforcement of child labor laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (prohibition against polygamy). The lower court's startling conclusion that the eradication of sex discrimination is not at least as compelling as the interests considered in these cases is certainly a matter warranting this Court's full attention.

Never before has this Court been called upon to consider whether unlawful discriminatory conduct by a religiously affiliated employer is constitutionally immune from governmental regulation because such conduct was grounded on religious belief.[4] The present case quite clearly

[4] In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court was asked to consider whether the First Amendment precluded application of the National Labor Relations Act to religiously affiliated employers. While this Court found that the case raised significant constitutional issues, it did not reach the merits of the constitutional question because of the absence of a clear expression of Congressional intent to bring teachers in church operated schools under the protection of the Act.

evidences the need for this Court's consideration of this issue. Purporting to apply the same balancing standards, the district court and the appellate court have come to conclusions that differ starkly on each standard of inquiry pertinent to both the Free Exercise Clause and Establishment Clause. Comparison of the Sixth Circuit's holding on the free exercise issue to the holding in *United States v. Lee* reveals significant disparities between this Court's assessment of state authority to regulate conduct based on religious belief in compelling circumstances and that proffered by the lower court. This Court held in *Lee* that the government's "very high" interest in assurring mandatory and continuous participation in and contribution to the nationwide social security system overcame the Amish employer's objection to such participation and contribution on religious grounds. 455 U.S. at 259. The Free Exercise Clause did not prohibit enforcement of the secular interest even though its application to the Amish employer would require him and his employees to actively and continuously violate their religious belief. The Sixth Circuit, on the other hand, has held that the state's "substantial and compelling" interest on eliminating sex discrimination does not permit the application of its facially neutral prohibitions to a religiously affiliated employer, even though the employer would not be required to actively or repeatedly violate its religious beliefs. Requiring Dayton Christian Schools to submit to the Commission's statutory jurisdiction could result at most in requiring Dayton Christian Schools to refrain from taking unlawful discriminatory or retaliatory actions against an employee. As the district court noted "[n]othing in Chapter 4112 would force any of the Plaintiffs themselves to act contrary to [their] belief." (A-105).

This Court's consideration of this case is further warranted by the existence of conflicting decisions at the appellate level. In dramatic contrast to the premises and conclusions of the Sixth Circuit in this case, the United States Court of Appeals for the Ninth Circuit held in *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272, 1281 (1982) that the compelling public interest in eradicating sex based discrimination embodied in Title VII of the Civil Rights Act of 1964, 42

U.S.C. Section 2000e *et seq.*,[5] was sufficient to override the assertion that the pervasively religious nature of an employer's activities or the exercise of its particular religious beliefs immunizes its employment decisions from agency enforcement. The court held that application of Title VII to the religious publishing house did not violate the First Amendment even though, as in this case, the dismissal of the employee was based upon the violation of a church doctrine prohibiting lawsuits by members against the church. The Ninth Circuit also held that permitting enforcement of Title VII against religiously affiliated employers did not constitute an impermissible entanglement with religion in violation of the Establishment Clause.

The Fifth Circuit Court of Appeals has held likewise that while a religious educational institution may discriminate in favor of members of its faith and matters of purely ecclesiastical concern, such institutions are not otherwise exempt from the Title VII prohibitions against discrimination based upon race, sex or national origin. *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981). That court also concluded, contrary to the Sixth Circuit's decision in this case, the fact "[t]hat faculty members are expected to serve as examples of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern," requiring constitutional exception from governmental regulation. *Id.*, 626 F.2d at 485.

The Sixth Circuit attempted to avoid its apparent conflict with these decisions by purporting to distinguish them on the basis that Title VII provides exemption for religious discrimination, while the Ohio statutory scheme does not (A-16-17, note 18). This purported distinction is incorporated into the

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[5]Title VII and Ohio Revised Code Chapter 4112 are highly analogous statutes, *Youngblood v. Dalzell*, 10 FEP Cases 605, 6 EPD ¶ 8719 (S.D. Ohio 1973); *Plumbers & Steamfitters Joint Apprenticeship Committee, v. Ohio Civil Rights Commission*, 66 *Ohio St. 2d 192, 196* (1981). While the Sixth Circuit attempted to distinguish Ohio's statute on the basis that it does not contain an exemption for religious institutions, it noted that the statutes are analogous in most other respects. (A-16).

court's holdings with respect to both the Free Exercise and Establishment Clauses.[6] The court's attempt to distinguish these cases is based on an erroneously broad reading of the Title VII exemptions. As the discussions of the legislative history of Title VII set out in *Pacific Press* at 676 F.2d 1276 demonstrates, Title VII "provides only a limited exemption enabling [religious employers] to discriminate in favor of co-religionists." Title VII does not exempt religiously affiliated institutions from its religiously neutral prohibitions simply because the conduct is based on religious beliefs. The flaw in the lower court's attempt to distinguish the Title VII cases relied upon by the district court is apparent. Regardless of whether the Ohio law contains a parallel exemption permitting religious discrimination,[7] that exemption would not be applicable in this instance. Mrs. Hoskinson was not terminated because she was a Catholic, a Protestant or a Jew. Mrs. Hoskinson was terminated because she was pregnant and because she sought to learn whether her termination was lawful. These are patently discriminatory and unlawfully retaliatory acts under Ohio's facially neutral laws prohibiting sex discrimination and should not be covered with a cloak of First Amendment immunity. The Sixth Circuit's refusal to permit the state to inquire further into these acts is in direct conflict with the decision of the Ninth Circuit in *Pacific Press* and with the Fifth Circuit's analysis of this issue in *Mississippi College*.

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[6]With respect to the former, the court's holding states "allowing the Ohio Civil Rights Commission to assert jurisdiction over the instant complaint against Dayton Christian Schools when such complaint is based on conduct pursuant to admittedly sincerely held religious beliefs and where the Ohio Civil Rights Act makes no provision for accomodation of those beliefs, unduly burdens the plaintiffs' right to free exercise of religion." (A-39). In connection with its conclusion that application of the Ohio Civil Rights Acts in this context impermissibly entangles the state in issues of faith in violation of the Establishment Clause, the lower court notes "that most jurisdictions avoid these possible entanglements by exempting religious institutions from compliance with employment discrimination laws." (A-49, note 51).

[7]The Sixth Circuit erroneously concluded that the Ohio law does not contain an exemption parallel to that contained in Title VII. To the contrary, the Ohio law provides that a religiously affiliated employer may limit or deny employment opportunities because of religion "where based on a bona fide occupational qualification certified in advance by the Commission." Ohio Revised Code Section 4112.02(E).

The Sixth Circuit has provided Dayton Christian Schools, and arguably any religiously affiliated employer, with a constitutional license to violate a neutral state law prohibiting discrimination. The only prerequisite for such license is that the employer be able to articulate some religious tenet that would appear to support the discriminatory conduct and that is not "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981). Because this case presents a substantial question as to whether the lower court struck a proper balance between the equally compelling but competing values enshrined in the Religion Clauses and embodied in federal and state civil rights statutes, the lower court's analysis of the admittedly difficult issues that arise in any such balancing attempt should be fully reviewed by this Court.

A. THE FREE EXERCISE CLAUSE.

Both the lower courts concluded, with little difficulty and quite correctly, that the state's interest in eradicating sex discrimination was substantial and compelling. (A-108, A-36). The courts' views with respect to the remaining issues pertinent to the free exercise question differed widely.

1. The Burden On Free Exercise Rights.

The district court found that the threatened burden on Appellees' free exercise rights would be "only minimal." (A-105). The appellate court, on the other hand, concluded the burden would be "great." (A-24). The discrepancy in the courts' conclusions is primarily attributable to their differing views on the application of this Court's precedent of *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The appellate court assumed, with little or no factual comparison, that Appellees' claims were "similar in kind" to those of the Amish parents in *Yoder*. (A-26). The court's task was to consider not only the

kind of infringement but the magnitude as well. A review of this Court's findings in *Yoder* clearly demonstrates the error of the appellate court's assumption regarding its applicability in this case.

This Court found in *Yoder* that enforcement of the state's mandatory school attendance law would not only result in forcing the Amish to act contrary to their beliefs but could threaten the continuation of that particular religious sect. Amish communities were found to be "characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." 406 U.S. at 210. The concept of life apart from the world and its values was found to be "central" to Amish faith. *Id.* Amish religious belief was found to be so inextricably intertwined with their daily home life that exposure of Amish children after a certain age to public education in remote locations and circumstances alien to their home life gravely endangered the children's religious development and integration into the Amish faith community.

The extent of any perceptible infringement on Appellees' religious beliefs is not of similar magnitude. As the district court notes, "none of the parents, teachers, or administrators at Dayton Christian Schools would themselves be forced to engage in conduct violative of their religious beliefs were the proscriptions against sex discrimination in employment contained in Chapter 4112 brought to bear on Dayton Christian Schools." (A-106). Those who believe the Bible requires the mother to be at home remain free to stay at home. Those who believe the Bible prescribes following a Chain of Command remain free to follow that command. The students' potential exposure in the classroom to a single poor exemplar of these beliefs hardly compares to placing an Amish child in a modern consolidated school remote from and alien to his daily home life. The lower court's belief that its conclusions find support in *Yoder* simply will not withstand even minimal scrutiny.

2. Impairment Of The State's Interest.

The lower courts' assessments of the third and final balancing standard show no more commonality than their assessments of the previous standard. The district court found that exempting Dayton Christian Schools from the Ohio Civil Rights Act would "substantially undermine the state's objective of eradicating discrimination." (A-112). The appellate court found that such exemption "would not significantly interfere with the state's fulfillment of its goal." (A-37-38).

The Sixth Circuit supported its conclusion with two observations. First, the court noted that the state would still be able to regulate the employment practices of nonreligious institutions and of religious institutions except where religious belief is implicated. (A-38). Second, the court observed that the state might further its interest in eliminating sex discrimination by conditioning receipt of tax exemptions and of public aid for ancilliary educational services, such as bus transportation, educational materials and health services, on compliance with the Ohio Civil Rights Act. (A-38).

The lower court's first observation fails to appreciate the wide variety of religious beliefs that are subject to accomodation under the First Amendment. Because the state will be bound to accept all proffered articulations or interpretations of a religious belief, save those that are "so bizarre or so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause," *Thomas*, 450 U.S. at 715, a myriad of exceptions will likely flow from any holding that religious belief warrants a mandatory, unreviewable constitutional exemption from the civil rights laws. *See United States v. Lee*, 455 U.S. at 260; *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981). The lower court likewise failed to give due consideration to the qualitative ramifications of its holding. As is aptly noted by the Fifth Circuit in *EEOC v. Mississippi College*, 626 F.2d at 489:

> Although the number of religious educational institutions is minute in comparison to the

> number of employers subject to Title VII, their effect upon society at large is great because of the role they play in educating society's young. If the environment in which such institutions seek to achieve their religious and educational goals reflects unlawful discrimination, those discriminatory attitudes will be perpetuated with an influential segment of society, the detrimental effect of which cannot be estimated.

The inescapable conclusion when these factors are added to the lower court's narrow quantitative observation is that the cumulative impact of its holding is likely to significantly impair the state's goal of eradicating discrimination and, as the district court noted, likely "could lead to a course of events that would 'embroil the courts undesirably in religious controversy '."(A-112).

The lower court's second observation about the availability of other means is likewise subject to question. This case does not present a situation in which a state statute makes the practice of a religious belief unlawful. Mothers who believe that they are required to stay home with their small children are free to do so. Religionists who believe in a Biblical Chain of Command are free to submit to that belief. Moreover, the institution is still free to impose its ecclesiastical sanctions on members who fail to conform to such beliefs. The proper test to be applied in reviewing state statutes that only indirectly burden the exercise of religious belief is whether accomodation of the myriad exceptions flowing from a wide variety of religious beliefs "would radically restrict the operating latitude of legislature" to further a compelling state interest. *United States v. Lee*, 455 U.S. at 259, citing *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). The lower court's suggestion that the state's power to combat discrimination by religiously affiliated schools should be limited to the denial of benefits radically restricts the legislature's latitude, without necessarily minimizing the penalty the school must pay to engage in unlawful discriminatory conduct. The court's conclusion that denying

tax exemptions and withholding state aid to Dayton Christian Schools would be less restrictive than subjecting it to the remedial alternatives available to the Ohio Civil Rights Commission is speculative at best. Nor does the proffered alternative minimize the potential for entanglement between the state and religion or the likelihood of embroiling the courts in continuous religious controversy. Most important, however, is the fact that the means suggested by the court could not effectively accomplish the intended purpose. It is unrealistic to expect that employees who are subjected to unlawful discriminatory conduct will assert their rights if the state is not permitted to protect such employees from retaliatory job actions. Such protection of the individual's rights is essential to accomplish the purpose of the state law. *EEOC v. Pacific Press Publishing Assn.*, 676 F.2d at 1281. Missing from the lower court's benefit denial alternative is any mechanism for assuring that discriminatory conduct is brought to the state's attention and investigated. The facts in this case are entirely distinguishable from those in *Bob Jones University*, where the institution's discriminatory policy was a matter of public record and openly distributed. 103 S. Ct. 2023.

B. THE ESTABLISHMENT CLAUSE.

Both the district court and court of appeals applied this Court's three-part test for determining whether a statute constitutes an unlawful establishment of religion: (1) the statute must have a secular purpose; (2) the statute should neither inhibit nor foster religion; and (3) the law must not compel an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Neither court had difficulty concluding that the Ohio Civil Rights Act passes constitutional muster under the first two prongs of this test, but the courts radically differed on the issue of entanglement. The district court concluded that "any fears of excessive government are minimal" (A-118), whereas the court of appeals concluded "a high degree of entanglement is likely." (A-44). Such a wide divergence of legal opinion as to what constitutes excessive entanglement in the employment setting under the

same fact scenario underscores the need for this Court's plenary consideration.

The Sixth Circuit's conclusion of excessive government entanglement in large part rests on its assumption that the Ohio Civil Rights Commission's proceedings on employment discrimination charges against Dayton Christian Schools would necessarily raise issues of good faith and motivation. (A-49). It is, however, the granting of an exemption based upon religious belief, not the denial of such exemption, that places such matters at issue in the case at bar. Neither the sincerity of Dayton Christian Schools' religious beliefs nor whether the reasons alleged by Dayton Christian Schools were the true reasons for Linda Hoskinson's termination would be at issue in the proceedings before the Ohio Civil Rights Commission, absent the exemption granted by the lower court. Appellees freely admit that Mrs. Hoskinson's pregnancy was the basis for not renewing her teaching contract. Appellees similarly acknowledge that Mrs. Hoskinson was discharged for seeking assistance to oppose what she believed to be illegal discrimination. In essence, Appellees admit the acts alleged but have sought and been awarded immunity, indeed privilege, by the Sixth Circuit from official query. The Sixth Circuit in fact concedes that its creation of an exemption from the Ohio Civil Rights Act for employment decisions based on religious belief may necessitate inquiry into causation and sincerity to determine an employer's exempt status:

> Since the district court determined that the religious beliefs asserted were sincere and were the reason for the employment decisions at issue, we leave to another case the extent to which the Ohio Civil Rights Commission may inquire into causation and sincerity in determining whether the employment situation at issue is exempt from Ohio Civil Rights Commission regulation. (A-38, note 41).

Thus, the Sixth Circuit's decision creates the entanglement it seeks to avoid.

The Sixth Circuit also based its findings of excessive entanglement on the potential remedial powers the Ohio Civil Rights Commission could exercise with respect to Dayton Christian Schools. Significantly, none of the Ohio Civil Rights Commission's remedial powers had been exercised at this juncture. The district court, noting that the present action was brought when the Ohio Civil Rights Commission proceedings were still at a preliminary stage, refused to consider the Ohio Civil Rights Commission's possible post-hearing actions as too speculative for judicial consideration.

> To take into account all of the possible levels of government entanglement that *could* have resulted depending upon any number of possible outcomes that might have occurred had the threatened hearing gone forward would be to engage in determination of hypothetical questions long held to present nonjusticiable controversies. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Thorp v. Housing Authority of City of [Durham] [393] U.S. 268 (1969); Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972); *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662 (5th Cir. 1967). (A-116).

Thus, the appropriateness of the factors considered by the Sixth Circuit in finding excessive entanglement requires this Court's review.

Even if the potential application of the Ohio Civil Rights Commission's enforcement mechanisms was appropriately considered by the Sixth Circuit, its finding of excessive entanglement on that basis is in direct conflict with the Ninth Circuit's decision in *Pacific Press*, in which a similar Establishment Clause argument was raised by the Adventist publishing concern. The court there contrasted *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), wherein this Court had concluded that the sort of on-going supervision of employment decisions necessary to the enforcement of the National Labor Relations Act might entail too great an en-

tanglement between the government and a sectarian school. In *Pacific Press*, however, the Ninth Circuit determined: "Because neither the judgment in this suit nor Title VII's enforcement mechanisms result in any ongoing scrutiny of Press' operations. . .", no unlawful entanglement would result. *Pacific Press* at 1282. Other courts that have determined the question of Title VII's application to sectarian institutions have similarly determined that such application does not result in excessive government entanglement with religion. *EEOC v. Mississippi College*, 626 F.2d at 489; *Russell v. Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982); *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980). In the instant matter, the district court concluded that "[t]he enforcement procedure currently challenged poses no more threat of ongoing, continuous supervision than that presented under Title VII." (A-118). This conflict betwen the circuit courts, particularly where the lower court in the instant matter found the statutory schemes at issue to be comparable, warrants this Court's review.

Not only does exempting Dayton Christian Schools from Ohio's laws against discrimination fail to minimize government entanglement, such exemption actually may have the effect of advancing a religion in violation of the Establishment Clause. The application of the Ohio Civil Rights Act to Dayton Christian Schools would result only in the application of a facially neutral statute directed at ending sex based discrimination. In contrast, when the Sixth Circuit "accomodated" Dayton Christian Schools by immunizing the school from complying with the Ohio statute, the court issued judicial preference for religion which espouses beliefs that are contrary to law. By virtue of the Sixth Circuit's decision, Dayton Christian Schools has been afforded the license to ignore Ohio's laws against discrimination whereas other sects cannot. Not to enforce the statute at bar as it applies to Dayton Christian Schools would favor and aid it over religious denomiations which do not advocate forcing a mother to be in the home or prohibit resort to law. In the absence of this Court's review, this official preference would fly in the face of those directives recently proscribed in *Larson v. Valente*, 456

U.S. 228 (1982). There this Court instructed: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 225.

To the extent that the Sixth Circuit issued Dayton Christian Schools its official imprimatur to disregard the laws to which other employers, religious or otherwise, must adhere, it has fostered an impermissible religious favoritism in violation of the First Amendment. This Court has historically rejected such notions of governmental partiality. *See, e.g., Everson v. Board of Education*, 330 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Epperson v. Arkansas*, 393 U.S. 97 (1968). Accordingly, the instant case merits this Court's plenary consideration.

CONCLUSION

The issue presented by the instant appeal pits two of our nation's most closely held and frequently fought for principles — religion and equality. This Court has never before considered the relationship between these principles in the context of employment. The district court and court of appeals in the instant matter, purporting to apply the same tests, reached diametrically different conclusions. The Sixth Circuit's decision creates an irreconciliable difference of opinion between the federal courts of appeal on this issue. For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX

85-488

Case No.

Supreme Court, U.S.
FILED
SEP 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
Appellants.

v.

DAYTON CHRISTIAN SCHOOLS, INC., et al.,
Appellees.

ON APPEAL FROM UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-3124

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAYTON CHRISTIAN SCHOOLS, INC., et al.,

Plaintiffs-Appellants,

vs.

OHIO CIVIL RIGHTS COMMISSION, et al., *Defendants-Appellees.*

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and filed June 26, 1985

Before: CONTIE and MILBURN, Circuit Judges; and PECK, Senior Circuit Judge.

CONTIE, Circuit Judge. Plaintiffs Dayton Christian Schools, Inc., et al. appeal the district court's order dismissing their complaint pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief from application of the Ohio Civil Rights Act, Ohio Rev. Code Ann. § 4112.01 *et seq.* (Page 1959).[1] Finding that the First Amendment to the United States Constitution proscribes application of the state statute in this context, we reverse.

[1] 578 F. Supp. 1004 (S.D. Ohio 1984).

I.

In Jaunary 1979, Linda Hoskinson, a teacher at Dayton Christian Schools (DCS), informed DCS Principal James Rakestraw that she was pregnant. When Rakestraw discussed this with DCS Superintendent Claude Schindler in February 1979, Schindler "instructed Mr. Rakestraw to write Mrs. Hoskinson a letter stating to her that because of our desire to have a mother home with pre-school age children, that she would not be issued a contract for the upcoming school year." On February 20, 1979, Rakestraw wrote such a letter to Hoskinson.[2]

After learning that she would not be rehired for the next school year, Hoskinson consulted an attorney who wrote to DCS threatening legal action for violation of state and federal statutes proscribing employment discrimination. On March 14, 1979, Hoskinson was terminated because she had consulted an attorney. In a letter dated March 27, 1979, the DCS Board rescinded the February letter in which the Board declined to rehire Hoskinson and instead discharged her for failing to follow the Biblical Chain-of-Command.[3]

---

[2]The letter stated:

> My concern . . . was . . . that as you will be a new parent (June) your teaching next year would be in contrast to the School's philosophy. As a school, we see the importance of the mother in the home during the early years of child growth. This is a factor we consider as we interview prospective teachers. If there are pre-school age children in the home we recommend the mother stay there and do not accept her application.

[3]The minutes of the Board meeting at which Hoskinson was terminated read as follows:

> The Board . . . has concluded that there is a serious philosophical difference between the Hoskinsons and Dayton Christian Schools. This has been evidenced by violation of paragraph 13, contained in the contract between Linda Hoskinson and Dayton Christian School dated April 17.

Paragraph 13 refers to the Chain-of-Command concept which DCS construed as prohibiting Hoskinson from consulting an attorney. Paragraph 13, provides:

> The teacher agrees to follow the Biblical pattern of Matthew 18:15-17 and Galations 6:1 and always give a good report. All differences are to be resolved by utilizing Biblical principles — always presenting a united front.

On March 28, 1979, Hoskinson filed a charge of sex discrimination with the Ohio Civil Rights Commission (OCRC) alleging that the reason for her termination "was the schools' belief that during the early years of a child's growth, the mother's place is in the home." On April 18, 1979, the OCRC requested information on the matter from DCS, and on May 14, 1979, informed DCS that a formal investigation had begun. On October 24, 1979, OCRC informed DCS that a hearing would be held on November 16 and requested information including employment data on Hoskinson, blank employment applications, employee handbooks and rules and regulations, job descriptions and model contracts, information about employee pregnancies, employee grievance procedures, and complete personnel files for more than a dozen DCS employees. On January 28, 1980, OCRC informed DCS that the Commission had found probable cause to believe that DCS had engaged in unlawful discrimination. The Commission found that "[e]vidence does not indicate that the Ohio Civil Rights Commission lacks jurisdiction over Respondent because it is a religious institution." Further, the commission concluded that "[c]omplainant's discharge, and the reasons given for it by Respondent, were directly linked to the February 20, 1979 memo which stated that she would not be offered a contract because 'if there are pre-school age children in the home we recommend the mother stay there and do not accept her application.'" The Commission further suggested that the parties enter into a Conciliation Agreement and Consent Order. On April 18, 1980, the Commission issued a complaint against DCS and DCS answered asserting lack of jurisdiction due to the religious basis for the discharge.

On October 1, 1980, plaintiff-appellants, Dayton Christian Schools, Inc., Patterson Park Church, Christian Tabernacle, DCS Superintendent Claude Schindler, parents Stephen and Camillia House, and DCS teacher Paul Pyle brought this action pursuant to 42 U.S.C. § 1983 against the OCRC, five commissioners, the Ohio Attorney General, OCRC directors and two assistant attorney

generals.[4] Plaintiffs sought a declaratory judgment that enforcement of the Ohio Civil Rights Act against DCS violated the First, Ninth and Fourteenth Amendments and an injunction to enjoin interference with plaintiffs' free exercise of their religious beliefs. Plaintiffs also argue that the State's attempt to exercise jurisdiction over the school and its hiring practices violated the Establishment Clause of the First Amendement.[5] On October 6, the district court granted a temporary restraining order restraining the OCRC from proceeding with a public hearing concerning DCS employment practices. The parties agreed to consolidate trial on the merits with a hearing on plaintiffs' motion for a permanent injunction pursuant to Fed. R. Civ. P.65(a) (2). A one-day trial was held on December 8, 1980, and on January 6, 1984, the district court entered an order dismissing the case and denying plaintiffs relief. On July 30, 1984, the district court entered an order granting plaintiffs' request for an injunction pending appeal pursuant to Fed. R. Civ. P. 62(c).

II.

Our consideration of appellants' constitutional claims requires review of the facts regarding the nature of Dayton Christian Schools, the exercise of religion implicated in the OCRS's actions, and the statutory scheme from which DCS claims exemption. Of course, we recognize that " [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." Fed. R. Civ. P. 52(a); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 758 (1976) (plurality). We make no effort to "duplicate the role of the lower court," but only consider whether "the district court's account of the evidence

[4]The Houses alleged that the Act "burdens and endangers the ability of parents to chose a religious education for their children." Pyle alleged that the Act "burdens and endangers the opportunity of religious teachers and administrators to carry out their religious vocation in the Christian formation and education of young people."

[5]Appellants also asserted that the Act was unconstitutionally vague and overbroad. Since we find that the Act cannot be constitutionally applied to appellants, we do not address these arguments which were rejected by the district court. 578 F. Supp. at 1025-27.

is plausible in light of the record viewed in its entirety." *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1511-12 (1985).[6]

A.

The district court found that DCS has a "dominant religious purpose which permeates both the administrative and substantive aspects of the school." 578 F. Supp. at 1008-09. Further, the court found that

> [e]very aspect of the school's operation is geared toward exposing and educating the students on how to lead a Christian life by understanding what the members consider to be the guidance and direction provided by the Bible. As revealed in the testimony at the hearing on this matter and in the exhibits accepted into evidence, the teachers at DCS are selected because of their ability to blend their avowed religious beliefs into every lesson and school activity. Teachers are required to be born again Christians and to carry with them into their classes the religious fervor and conviction felt necessary to stimulate young minds into accepted Christ as savior. Because of the emphasis placed on the religious education of the students, the school demands that teachers conform both in thought and conduct to the tenets and principles felt essential to leading a Christian life. The belief system espoused by the members of DCS touches every aspect of their life: work, interpersonal relationships, family and recreational activities. Deviation in any way from what is felt to be the proper religious way of life may cast doubt on a teacher's ability to perform his or her critical role and may, therefore, be grounds for dismissal.

[6]Few of the district court's findings of fact are contested in this appeal. We review these facts to establish the basis for our rulings on the constitutional claims. *Roemer*, 426 U.S. at 758. With respect to the religious nature of DCS employment practices, we consider "the activities at issue by reference to objectively ascertainable facts concerning their nature and scope." *Tony and Susan Alamo Fdn. v. Secretary of Labor*, 105 S. Ct. 1953, 1960-61 (1985). We note, however, that the OCRC does not cross-appeal challenging the district court's findings of fact. Therefore, we do not consider whether the district court erred in concluding that the religious beliefs in question were sincerely held or that DCS discharged Hoskinson because of those sincerely held beliefs.

578 F. Supp. at 1018-19.

DCS stated as its purposes "to teach all subjects in a manner to create in each student an awareness of God's Supreme authority over all creation" and "to train and prepare youth for worthy contributions to the Cause of Christ in the home, church and community." DCS Certificate of Consolidation.[7] "The major distinction of DCS is the fact that all truth is related and interpreted from God's viewpoint." Cover letter to applicants for employment. Both teachers and parents of DCS students must subscribe to the DCS Statement of Faith.[8] Schindler confirmed that applicants who did not subscribe to the Statement of Faith would not be considered for employment. Further, Superintendent Schindler testified that "[o]ne parent in the family must be a professing Christian, must be born again. And the student in the school must be a Christian, or professing Christian." Testimony in the district court

[7]The Preamble to the DCS Constitution provides:

> The Corporation will provide an educational curriculum of the highest possible standards in order to prepare the student for purposeful Godliness in any vocation or entrance into institutions of higher learning. Further, as a regular part of the curriculum of the school(s) of the Corporation, each student will be taught Christian doctrine based on the Bible as the textbook authority for such instruction and learning.
>
> This we do in obedience to God's Word, namely: to train children in the nurture and admonition of the Lord (Ephesians 6:4). Further, we recognize the necessity for the moral and spiritual development of our youth through Christian education in harmony with the Holy Bible.

[8]The Statement of Faith provides:

> Each member of the Board of Directors and each member of the educational staff of the Corporation having accepted Jesus Christ as personal Savior, shall subscribe annually in writing to the following statement of Faith:
>
> 1. I believe the Bible to be the inspired and the only infallible authoritative Word of God.
> 2. I believe that there is one God, eternally existent in three persons: Father, Son, and Holy Spirit.
> 3. I believe in the deity of our Lord Jesus Christ, in His Virgin Birth, in His sinless life, in His Miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory.
> 4. I believe that man is sinful by nature and that regeneration by the Holy Spirit is essential for his salvation.

indicated that the parents' obligation to educate their children in accordance with Christian principles is biblically based.[9].

> 5. I believe in the continuing ministry of the Holy Spirit, by whose indwelling the Christian is enabled to live a Godly life.
> 6. I believe in the resurrection of both the saved and the lost. They who are saved unto eternal life and they who are lost unto eternal damnation.
> 7. I believe in the spiritual unity of believers in our Lord Jesus Christ.
> 8. I believe in the creation of man by the direct Act of God.

The DCS Constitution includes the following provisions. Art. III § 2 provides:

> Each member of the Board of Directors shall be a person known as a professing and exemplary Christian as prescribed in the Statement of Faith.

Art. V, § 1A provides:

> The Board of Directors shall [s]erve as spiritual leaders of the Corporation, waiting upon God for His direction and wisdom.

Art. VIII provides:

> All educational staff members must be members of a church having a doctrine which is in agreement with the Statement of Faith, must be scripturally sound in their teaching, and must lead exemplary Christian lives.

[9]Superintendent Schindler, a minister, testified:

> In the Bible, Deuteronomy, Chapter 6, verses 5 through 7, parents are commanded to diligently train their children to love Thy God with all their heart, soul and mind every moment of the day. That command is given to parents. And we feel that the primary responsibility for the education is a parental responsibility. If you look at that verse, it basically indicates very strongly to us that there can be no separation between secular and sacred. We believe that all truth comes from God.
>
> And, in fact, in John, Chapter 14, verse 6, it says — Jesus Christ himself said, "I am the way, the truth and the light. No man cometh unto the Father but by Me." So thus, we feel that the instruction we must give our children is there can't been any differentiation between secular and sacred, that God himself is the center of all aspects of learning and everything that's God's.
>
> And thus, our mission at Dayton Christian Schools is, in essence, to be a servant to the home and to help mom and dad fulfill their God's responsibilities to train their children to love God with all their heart, soul and mind.
>
> And that being our mission, it then centers — than forms into the philosophy of education. And that philosophy is that our mission, our goal, is to help these young people become like Jesus Christ, to think like Him, to act like Him, by demonstrating their characters and qualities in their lives. We believe that is crucial, that a Christian becomes like Him. And thus, He becomes the focus in everything we do in our school. In fact, we believe that the Scriptures, in Proverbs 19:27, and many other passages, that I feel this way myself as a parent, but that I have no choice but to put my children into Christian schools where God is made paramount, that to do anything other than that would be a sin and would be wrong for me.

See also testimony of DCS Board Member Henkle.

The religious focus of the school is reflected in the teacher selection process and concomitant role of the teacher in the school. Schindler testified that "[t]he teacher's relationship with Jesus Christ and their life style is crucial to their subsequent employment at Dayton Christian Schools." Further, "[w]e feel that a teaching position is so crucial in our school and so vital to the performance of our ministry, that . . . [b]efore we make the recommendation to the Board to hire our teachers, we must be in total harmony about that teacher's commitment to Christ and her life style and her ability to teach in our system."

Teacher Paul Pyle testified regarding his experience as a teacher at DCS.

> Then I begin each class with prayer. Sometimes I begin each class with a devotional thought, something that is fresh to me from the Scriptures that I have gotten that day or just recently. However, if I were to tell you that that would — was the extent of the religious activities during the day, that would be misleading. In my opinion, and in my endeavors in the classroom, the entire class period is given over to religious activities. I try to make sure that everything I do in someway adheres to Biblical principles that I have learned from the Bible through my being taught at Dayton Christian and through my own Bible studies. Could I go on and give an example?
>
> Q Sure.
>
> A For instance, when we are studying any literature, the thing I stress with my students in literature is all human thought can be tested within the absolute standards of the Scriptures. So we go through and discover the theme of that story in detail, to use the answer, test that to decide whether its true or false. And you can see that my putting the Scripture up as the ultimate authority comes through in the classroom day after day.

These facts support the district court's conclusion that DCS is a pervasively religious institution in which religious considerations permeate all aspects of the educational process, govern the teacher selection process, and dictate parents' entrustment of their children's education to the school.[10]

B.

The Ohio Civil Rights Commission's complaint of discrimination implicates two asserted religious beliefs of appellants: the belief that a mother's place is in the home and the belief in a Chain-of-Command for resolving disputes among church members. We review the role of these beliefs in the appellant's religion to instruct our assessment of the constitutionality of the Ohio Civil Rights Act.

Superintendent Schindler testified:

> We believe that the Bible teaches that even though we are equal in the sight of God, our role is different, the role of the female is different than that of the male. The Scripture teaches that in I Peter, Chapter 3; I Timothy, Chapter 2, Titus, Chapter 2, just to mention a few passages of the Scripture. And in those passages it spells out the role of a woman. And my counseling with Mr. Rakestraw is based upon those principles in God's words. And we felt they directly related to a woman being home with her pre-school age children. We

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[10]DCS asserts that the district court committed clear error in finding that DCS was a "mere school" rather than a "church". While we recognize that different religious interests are at stake when a church rather than a school is involved, *Bob Jones University* v. *United States*, 461 U.S. 574, 604 n.29 (1983); *EEOC* v. *Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981), and that different educational institutions may require differential treatment in protection of religious liberties, *Lemon* v. *Kurtzman (Lemon I)*, 403 U.S. 602 (1971); *Tilton* v. *Richardson*, 403 U.S. 672 (1971), we find church/school labels unhelpful in our analysis, and, in fact, not dispositive of this case. The nature of the institution is sufficiently spelled out above and in the district court's opinion to allow consideration of the religious interests without reference to whether a church or school, or a teacher or minister is involved. Rigid schemes of analysis are particularly unhelpful in the First Amendment context.

rescinded the letter because after counseling we found that we had not adequately explained this to our faculty and to our staff. And thus Mrs. Hoskinson was not fully aware of the convictions of the administration and of the School Board relative to this particular Bibilical principle.

Q Was there any change on the school's position on this issue?

A No, sir. We feel as strongly today about the Biblical principle as we did before rescinding this letter.

While Hoskinson was not aware of the church belief regarding teachers with pre-school age children and such philosophy was not specifically delineated, 578 F. Supp. at 1012, the philosophy, although biblically rooted, was known to Schindler primarily from previous experiences with the school board.[11] Schindler testified that he instructed Rakestraw to write the letter to Hoskinson

> [b]ecause on further — past experiences I had been denied applications that I had presented to the Board where there was a mother with pre-school age children. I knew their philosphy and I knew it well, and I knew what their counsel would be to me.

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[11]While no precise articulation of this belief is included in the school's literature, the importance of the family unit is readily apparent. DCS aims "[t]o develop both good and proper attitudes toward marriage and the family and also the understanding and skills needed to establish God-honoring homes." Educational Philosophy of Dayton Christian Schools. Likewise, Art IV, § 1 of the Parent-Teacher Fellowship Constitution provides:

> This Fellowship believes that God has clearly established the husband/Father as the spiritual leader of the home and, as such, preserves the offices of the President and Vice President for men fulfilling their spiritual leadership responsibilities.

Further, the interview questions for teacher applicants asked:

> How do you perceive God's plan for the home — a) husband/wife, b) husband/child, c) mother/child.

Q Was it your testimony that you had presented employment candidates to the Board on prior occasions but your recommendations were turned down because they had pre-school age children at home?

A Yes, one specific application, yes sir.

The district court found that "the record supports the conclusion that, at least in the mind of Mr. Schindler, the nonrenewal of Mrs. Hoskinson's teaching contract was an act consistent with and compelled by religious beliefs." 578 F. Supp. at 1012. Further,

> [t]the Court cannot accept Defendants' contention that the initial decision not to renew Mrs. Hoskinson's contract was prompted solely by Mr. Schindler's personal philosophy and that, therefore, OCRC review of that decision could not even raise potential first amendment concerns. Though the belief may not be documented or as well known or accepted as other precepts discussed during the proceeding, the evidence clearly establishes that Mr. Schindler's conduct was based upon religiously founded principles. The Court does not feel it proper to relegate this personally held religious belief to an artificial lesser status of "personal philosophy" simply because the belief might not have been a clearly articulated tenet at DCS. The Court finds, therefore, that the initial decision not to renew Mrs. Hoskinson's teaching contract was founded on religious precepts and therefore falls within the ambit of the first amendment's protection afforded to the free exercise of religion.

Id. at 1031.

The Chain of Command is a biblically based authority structure which depends on the internal peaceful resolution

of differences.[12] The Chain of Command concept is related to the concept of giving a good report.[13] Hoskinson's contract included the following provision:

> The teacher agrees to follow the Biblical pattern of Matthew 18:15-17 and Galations 6:0 and always give a good report. All differences are to be resolved by utilizing Biblical principles — always presenting a united front.

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[12]Schindler testified:

> The way the Scriptures teach, the way we are to love God is by our obedience. And we know the Scriptures teach that in obedience, there's certain authority structures that He has established. And we feel that it's important that each teacher recognizes the authorities that have been placed over them, as well as we expect the students to recognize the authority the teacher has over them. And we expect them to respond to what is placed in front of them in the Teacher's Manual. But if they have a disagreement or do not concur with what is in the Policy Manual, they have an avenue open to them to come to us and discuss, according to Matthew, Chapter 18:15-17, and to air their concerns with reference to that particular policy. If they are not satisfied with that, they can — a procedure is established that they can go to the administrator and ultimately to the Board for resolving that particular conflict. Without that avenue open, we expect them to respond to what we ask them to do.

[13]Schindler testified:

> Q. And what's the purpose of having your staff sign a document such as Giving a Good Report?
>
> A. We think it is a very important Scriptural principle and we also recognize that we are prone sometimes to forget about the principle. And so we have them sign it to remind them of what they committing themselves to. We also have little cards that we place on their desks that reminds them, as well as a person that might be on the other side of the desk, that they committed to this particular principle.
>
> Q. What is the principle of giving a good report?
>
> A. The principle of giving a good report means that I will not give a bad report about someone else to another party, nor will I listen to a bad report from someone else about that party, unless I am being asked, according to Matthew 18, to go as a witness. In other words, I will not receive a bad report about a teacher from a parent unless that parent has first made contact with the teacher and as a result of that contact is not satisfied, then I will go along that parent to the teacher to resolve it. If that doesn't resolve it, then the three of us, in turn, will go to our Board of Directors to resolve the conflict. That's what we call the chain of command, as specified in Matthew, Chapter 18.

Further, Hoskinson wrote on her application for employment that "[o]bedience to those in authority over you is clearly stated in the Bible. I believe in God's chain of command."

The district court found that "Hoskinson was aware of the requirement that all teachers follow the Chain of Command prior to consulting her attorney and prior to her discharge." 578 F. Supp. at 1012. "The eventual discharge of Mrs. Hoskinson stemmed from the fact that she contacted an attorney in response to actions taken by the school regarding her employment." *Id.* at 1013.[14] The district court found that the Chain-of-Command concept "is both well articulated and generally held and ascribed to by the DCS staff and administration." *Id* at 1032. The court concluded:

> Thus, when the Board made the determination that Mrs. Hoskinson's contract should be terminated because of "philosophical differences" stemming from her taking her complaint about the nonrenewal of her contract to an attorney, this decision was consistent with the Board's expressed and established religious belief that disputes be resolved internally and in accordance with the Biblical Chain of Command.

Id.[15]

C.

The Ohio Civil Rights Act, effective July 29, 1959, provides in pertinent part:

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[14]Although DCS rescinded the memorandum of February 20 citing the policy on mothers with pre-school age children as the reason for not rehiring Hoskinson, this religious belief is relevant since the OCRC premises its exercise of jurisdiction in part on DCS's actions taken pursuant to that belief.

[15]Whether or not adherence to a particular philosophy constitutes a religious belief entitled to constitutional protection is a question of fact. *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 314 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). Since the OCRC does not cross-appeal, the facts as found by the district court are accepted as established with respect to our consideration of the constitutional issues.

> It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Ohio Rev. Code Ann. § 4112.02(A).[16] The Act also makes it unlawful

> [f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful practice defined in this section, or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding or hearing under sections 4112.01 to 4112.07 of the Revised Code.

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[16]The statute defines "employer" as "any person employing four or more persons." Ohio Rev. Code Ann. § 4112.01(A) (2). Further, subsection (A) (1) provides that the term "'[p]erson' includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees in bankruptcy, receivers, and other organized groups of person."

The statutes provides that "the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth or related medical conditions. Women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes. . . ." Ohio Rev. Code Ann. § 4112.01(B).

Section 4112.02(E) is a list of prohibited practices in addition to those forbidden by other subsections of section 4112.02. The practices listed in subsection (E) are prohibited "[e]xcept where based on a bona fide occupational qualification certified in advance by the commission." No such exception is provided for violations of subsections (A) and (I) violation of which appellants are charged with in the complaint issued by the Commission.

Ohio Rev. Code Ann. § 4112.02(I).[17]

The Act establishes the Ohio Civil Rights Commission, section 4112.03, to [r]eceive, investigate, and pass upon written charges made under oath. . . ." Section 4112.04(A) (6). The statute empowers the OCRC to hold hearings, subpoena witnesses, administer oaths, and to require the production of books and papers. Section 4112.04(B) (3). The Act further obligates the Ccmmission, prior to a formal hearing, to "attempt, by informal methods of persuasion and conciliation, to induce compliance with" the Act. Section 4112.05(A). The Act authorizes the Commission, upon the filing of a charge, to initiate preliminary investigation. Section 4112.05(B). If the Commission determines that it is probable that unlawful practices were engaged in and the Commission fails to secure voluntary compliance with Chapter 4112, the Commission may issue and cause to be served a complaint. *Id. See generally* Ohio Admin. Code § 4112. If after a hearing, the Commission determines that unlawful practices have been engaged in it shall

> cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of sections 4112.01 to 4112.08 of the Revised Code, including, but not limited to, hiring, reinstatement, or upgrading of employees with, or without, backpay. . . .

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[17]While the statute, in section 4112.02(H), also proscribes discrimination in housing, the Act provides the following exception.

> (K) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, or any bona fide private or fraternal organization, from giving preference to persons of the same religion or denomination, or to members of the same religion or denomination, or to members of such private or fraternal organization, or from making such selection as is calculated by such organization to promote the religious principles or the aims, purpose, or fraternal principles for which it is established or maintained.

Section 4112.05(G).

Ohio Rev. Code Ann. § 4112.06 provides for judicial review of Commission orders in the court of common pleas. While the court has the power to grant temporary relief and to enforce, modify, or set aside an order of the Commission, section 4112.06(B), a party seeking judicial review is not entitled to *de novo* consideration. "The findings of the commission as to the facts shall be conclusive if supported by reliable, probative, and substantial evidence on the record. . . ." Section 4112.06(E). Violation of section 4112.02(A) is a third-degree misdemeanor. Section 4112.99.

In this case, appellants instituted this action after filing of the charge, an attempted conciliation, the preliminary investigation, the finding of probable cause, and issuance of the complaint.[18]

[18]We note that the Ohio Civil Rights Act, while in some respects analogous to the employment provisions of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, differs in two critical ways. 42 U.S.C. § 2000e-1 provides:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

While this section deprives the federal courts of jurisdiction in suits based on religious discrimination, *Dolter* v. *Wahlert High School*, 483 F. Supp. 266, 269 (N.D. Iowa 1980), the section has been held violative of the Establishment Clause and Equal Protection Clause to the extent it protects religious institutions from compliance with Title VII when engaged in secular activities, *King's Garden, Inc.* v. *FCC*, 498 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). Further, the section exempts religious institutions from actions for religious discrimination alone and not other types of actions for discrimination. *Dolter*, 483 F. Supp. at 269. It has been held that when an act of discrimination might constitute both religious and a non-exempt form of discrimination, the court may inquire whether a religious or non-religious basis for the discrimination existed. *Id.* at 270. This view is premised on the notion that separate and distinct causes for a single act can be isolated and does not comprehend the facts of the pending case wherein the alleged act of discrimination is taken pursuant to a religious belief and the state infers from that act a non-exempt form of discrimination.

The pending case is distinguished from the Title VII cases heavily relied on by the district court due to the absence of a parallel exemption in the Ohio statute and the particular facts of this case, involving an admittedly religious institution, engaged in a pervasively religious activity, and an asserted religious basis for the challenged employment practices. *See EEOC* v. *Pacific Press Publishing Assn.*, 676 F.2d 1272, 1279 (9th Cir. 1982) (no religious basis asserted for wage discrimination); *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277, 286 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *EEOC* v. *Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980). Likewise, see *McClur* v. *Salvation Army*, 460 F.2d 553, 558 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *Russell* v. *Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982); *Ritter* v. *Mount St. Mary's College*, 495 F. Supp. 724, 729 (D. Md. 1980); *Witney* v. *Greater New York Corporation of Seventh Day Adventists*, 401 F. Supp. 1363, 1368 (S.D. N.Y. 1975).

In addition, 42 U.S.C. § 2000e-2(e) (2) provides:

> Notwithstanding any other provision of this subchapter, . . . it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

The Ohio statute likewise contains no such exemption. State employment discrimination laws enacted after the passage of the Civil Rights Act of 1964, unlike the Ohio statute (effective July 29, 1959), generally include an exemption for religious discrimination by religious institutions. In this circuit, *see* Ky. Rev. Stat. § 344.090(2), (3) (1966); Mich. Comp. Laws Ann. § 37.2403 (1977); Tenn. Code Ann § 4-21-109 (1979). Statutory exemptions usually appear as either a provision parallel to 42 U.S.C. § 2000e-1, Ariz. Rev. Stat. Ann § 41-1462 (1974); Neb. Rev. Stat. § 48-1103 (1965); Nev. Rev. Stat. § 613.320(2) (1965); Tex. Civil Code Ann. art 5221K §5.06(1) (Vernon 1983), a provision parallel to 42 U.S.C. § 2000e-2(e) (2), Ariz. Rev. Stat. Ann § 41-1463(F) (2) (1980); D.C. Code Ann. § 1-2503 (1977); Hawaii Rev. Stat. § 378-3(5) (1984); Md. Ann Code art. 49B, § 16(g) (3) (1978); Mass. Gen. Laws Ann. ch. 151B, § 4(15) (1980); Neb. Rev. Stat. § 48-1108 (1965); N.H. Rev. Stat. Ann. § 354-A:8 (IV) (1979); N.J. Stat. Ann. §10:5-12(a) (1981); N.M. Stat. Ann. § 28-1-9(B) (1975); N.Y. Executive Law § 296(11) (McKinney 1984); Nev. Rev. Stat. § 613.350(4) (1981); Okla. Stat. Ann. tit. 25, § 1308(2) (1981); Or. Rev. Stat. § 659.020(2) (1977); Pa. Stat. Ann. tit. 43, § 955 (Purdon 1982); S.C. Code Ann. § 1-13-80 (Law Co-op. 1979); S.D. Comp. Laws Ann. §§ 70-13-18, -22 (1972, 1981); Tex. Civil Code Ann. art. 5221K § 5.07(a) (2) (Vernon 1983); Utah Code Ann. § 34-35-6(2) (b) (1979); Wis. Stat. Ann. § 111.337(2) (a) (West 1983), a provision parallel to 42 U.S.C. § 2000e-2(e) (1), Conn. Gen. Stat. Ann. § 46a-60 (1982); Fla. Stat. Ann. § 760.10(8) (a) (1981); Hawaii Rev. Stat. § 378-3(2) (1984); Idaho Code § 18-7303 (1972); Iowa Code Ann. § 601A.6(5) (d) (West 1978); Minn. Stat. Ann. § 363.02(1), (2) (West 1984); Okla. Stat. Ann. tit. 25, § 1308(1) (West 1981); Vt. Stat. Ann. tit. 21, § 495a (1981), or as a definition of "employer" which excludes religious employers, Colo. Rev. Stat. § 24-34-401(3) (1979); Del. Code Ann. tit. 19 § 710(2) (1970); Ill. Ann. Stat. ch. 68, § 2-101(B) (2) (Smith-Hurd 1983); Ind. Code Ann. § 22-9-1-3 (h) (West 1978); Kan. Stat. Ann. § 44-1102(b) (1975); La. Rev. Stat. Ann. tit. 23, § 1006(A) (2) (West 1984); Me. Rev. Stat. Ann tit. 5, § 4553(4) (1975); Mass. Gen. Laws Ann. ch. 151B, § 1(5) (West 1979); Mo. Ann. Stat. § 296.010(2) (Vernon 1978); Mont. Code Ann. § 49-2-101(8) (1979); N.H. Rev. Stat. Ann. § 354-A:3(V) (1975); Pa. Stat. Ann. tit. 43 § 954(b) (Purdon 1982); R.I. Gen. Laws § 28-5-6(B) (1981); Utah Code Ann. § 34-35-2(5) (1979); Wash. Rev. Code Ann. § 49.60.040 (1961); Wyo. Stat. § 27-9-102(b) (1965). However, *see* Ga. Code Ann. § 34-5-3 (1966); N.C. Gen. Stat. § 143-422.1-3 (1977).

III.

A statute "ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *St. Martin Evangelical Lutheran* v. *South Dakota*, 471 U.S. 772, 780 (1981). *See Tilton* v. *Richardson*, 403 U.S. 672, 676-77 (1971). However, this rule of construction does not "license a court to usurp the policy-making and legislative functions of duly-elected representatives." *Heckler* v. *Mathews*, 104 S. Ct. 1387, 1396 (1984). In seeking an alternative construction we must determine first, whether the exercise of jurisdiction by the OCRC "would give rise to serious constitutional questions," and, second, if so, whether there is clear expression of affirmative legislative intent to so extend the Commission's jurisdiction. *Catholic Bishop of Chicago*, 440 U.S. at 501; *Tony and Susan Alamo Fdn.* v. *Secretary of Labor*, 105 S. Ct. 1953, 1960 n.18 (1985).

Although the parties plainly cannot consent to jurisdiction, the parties agree, and the district court had little trouble concluding, that exercise of jurisdiction by the Commission implicates serious constitutional questions. While we need not resolve the merits of the constitutional claims at this preliminary stage of inquiry, we note that "[t]he values enshrined in the First Amendment plainly rank high 'in the scale of our national values.' " *Catholic Bishop*, 440 U.S. at 501. The facts of this case set against the governing principles and objectives of neutrality and accommodation inherent in the First Amendment's protection of religious belief reveal the "significant risk that the First Amendment will be infringed." *Id* at 502. With respect to appellants' Free Exercise Clause claim, the Court has repeatedly recognized parents' special interest in guiding and providing the education of their children consonant with their own religious beliefs. *Norwood* v. *Harrison*, 413 U.S. 455 (1973); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35 (1925). While the state's interest in eliminating employment discrimination based on sex is entitled to deference and respect, *Roberts* v. *United States Jaycees*, *104*

S. Ct. 3244, 3253-55 (1984), important state interests have historically yielded to the limitations of the First Amendment, *Yoder*, 406 U.S. 205 (state interest in educated populace). Further, the highly intrusive nature of the remedies available to the Commission, Ohio Rev. Code Ann § 4112.05(G) (back-pay, reinstatement) and the probing and inquiry into decisions regarding religious activities made on religious grounds highlight the need for a careful consideration of whether there are less burdensome means by which the state might further even a concededly substantial interest. Accordingly, it is clear that the Commission's exercise of jurisdiction implicates a serious constitutional question with respect to the Free Exercise Clause of the First Amendment.

Likewise, there is a serious question regarding whether the state's inquiry into a religious school's decision on the religious qualifications of a religious instructor constitutes impermissible entanglement of the state in religious affairs in violation of the Establishment Clause. The Court has recognized the high likelihood of impermissible entanglement in state interaction with pervasively religious elementary schools, *Lemon* v. *Kurtzman (Lemon I)*, 403 U.S. 602, 616 (1971), especialy when that interaction leads to the continuing surveillance implicated by the conciliation agreement proposed by the Commission, *Lemon I*, 403 U.S. at 619. Further, the specter of impermissible entanglement arises when the state, as in this case, seeks to monitor or evaluate decisions or activities of the school which necessarily implicate religious doctrine. *See Volunteers of America-Minnesota-Bar None Boys Ranch* v. *NLRB*, 752 F.2d 345, 349 (8th Cir. 1985), *petition for cert. filed*, 53 U.S.L.W. 3759 (April 23, 1985) (no entanglement). Accordingly, in light of these serious constitutional questions, we consider whether the Ohio General Assembly intended to regulate the employment decisions of religious institutions.[19]

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[19]In this inquiry we are hampered by the absence of published legislative history respecting the enactment of the Ohio Civil Rights Act.

While the Act reflects no so-called "affirmative" expression of intent to include religious schools within the purview of the statutory prescriptions, to interpret the Act as inapplicable to religious schools would render illusory the plain meaning of its words and provisions. It is clear that the Ohio General Assembly exempted discrimination based on religion from those portions of the statute deemed desirable. With respect to some of the statutory prohibitions, the legislature provided that an employer might obtain a certification that religion was a bona fide occupational qualification, and, therefore, discriminate on the basis of religion. Section 4112.02(E). Further, with respect to housing discrimination, the legislature exempted religious institutions from the statutory prohibition "from giving preferences to persons of the same religion . . . or from making such selection as calculated by such organization to promote the religious principles or the aims, purposes, or fraternal principles for which it is established or maintained." Sections 4112.02(H), (K). The acts with which DCS is charged fall within neither of these exemptions.[20] The Act's definition of "employer" is broad and all-inclusive, indicating no intent to exempt religious employers. *See Tilton*, 403 U.S. at 677 (absence of statutory reference to religious affiliation or nonaffiliation indicates that "institutions of higher education" includes church-related institutions). Accordingly, the statute asserts a clear expression of intent to apply the prohibitions at issue in this case to all

[20]The Court has previously inferred an absence of intent to exempt from the lack of a statutory exemption in the Title VII scheme when Congress has provided exemptions for other employers. In *Hishon* v. *King & Spalding*, 104 S.Ct. 229 (1984), the Court proceeded to the constitutional inquiry after rejecting the argument that Congress intended to exempt partnership decisions from Title VII. "When Congress wanted to grant an employer complete immunity, it expressly did so." *Id.* at 2235 (footnote omitted) (citing exemption for religious employees). The intent to extend jurisdiction to partnerships in *Hishon* was no more "affirmative" than the intent in this case.

employers, including religious institutions.[21]. Even under the analysis of *Catholic Bishop*, we cannot avoid the constitutional questions posed here. Therefore, we consider whether the Act may be applied to DCS consistent with the commands of the First Amendment.

IV.

First among the amendments to our Constitution is the admonishment that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." These prohibitions apply equally to the states and their legislatures as part and parcel of the cherished liberties protected by the Fourteenth Amendment. *Chaplinsky* v. *State of New Hampshire*, 315 U.S. 568, 571 (1942); *Cantwell* v. *State of Connecticut*, 310 U.S. 296, 303 (1940).

Inquiries into the scope of these probibitions neither call for rigidity nor allow clearly defined rules. *Walz* v. *Tax Commission of City of New York*, 397 U.S. 664, 669 (1970). Rather, the hallmark of analysis under the religion clauses is flexibility, emphasizing the objectives of the prohibitions, rather than court-refined "tests" for ascertaining their parameters.[22]

[21]Finding that the Act could not rationally be construed to exclude religious institutions from the prohibitions at issue in this case and rejecting the district court's characterization of the burdens imposed by the Act, we express no opinion with respect to the district court's conclusion that a "lesser showing of affirmative legislative intent is sufficient to support the conclusion that the legislature intended the jurisdiction of OCRC to extend to religious schools such as DCS." 578 F. Supp. at 1024. *See also Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892) (statute prohibiting importation of immigrant workers not applicable to hiring of minister from Ireland; constitutional question not reached where it would be unreasonable to conclude that Congress intended to proscribe such hiring).

[22]The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the

Although the clauses "are cast in absolute terms," *Walz*, 397 U.S. at 668, "[n]o perfect or absolute separation is really possible," *id.* at 670, and "if expanded to a logical extreme, [each clause] would tend to clash with the other," *id.* at 668-69; *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962).[23] "'Establishment'

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opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

Walz, 397 U.S. at 668. Likewise, the court has often recognized the difficult nature of the fine distinctions required in inquiries pursuant to the religion clauses. This difficulty is reflected in the substantial dissents in several religion cases. *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984) (5-4); *Marsh* v. *Chambers*, 103 S. Ct. 3330 (1983) (6-3); *Larson* v. *Valente*, 456 U.S. 228 (1982) (5-4); *Heffron* v. *International Society for* Krishna Consciousness, Inc., 452 U.S. 640 (1981) (5-4); *Stone* v. *Graham*, 449 U.S. 39 (1980) (5-4); *Harris* v. *McRae*, *448 U.S. 297 (1980) (5-4)*; *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 652 (1980) (5-4); ("Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps, reflecting the different views on this subject of the people of this country."); *Jones* v. *Wolf*, 443 U.S. 595 (1979) (5-4); *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977) (6-3); *Wolman* v. *Walter*, 433 U.S. 229 (1977); *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736 (1976) (5-4); *Sloan* v. *Lemon*, 413 U.S. 825 (1973) (6-3); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Hunt* v. *McNair*, 413 U.S. 734 (1973) (6-3); *Lemon* v. *Kurtzman (Lemon II)*, 411 U.S. 192 (1973) (4-3); *Tilton* v. *Richardson*, 403 U.S. 672 (1971) (5-4); *Board of Education of Central School Dist. No. 1* v. *Allen*, 392 U.S. 236 (1968) (6-3); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 246 (1963) (Brennan, J., concurring) ("If the choice is often difficult, the difficulty is endemic to issues implicating the religious guarantees of the First Amendment."); *Braunfeld* v. *Brown*, *366 U.S. 599 (1961) (6-3)*; *Zorach* v. *Clauson*, 343 U.S. 306 (1952) (6-3); *Everson* v. *Board of Education of Ewing Twp.*, 330 U.S. 1 (1947) (5-4).

[23]The "wall of separation" which the clauses have been construed to compel arose from the writings of Jefferson.

> "Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."

People of State of Illinois ex rel. McCollum v. *Board of Education*, 333 U.S. at 244-5 n.8 (1948). "Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped." *Id.* at 231; *Nyquist*, 413 U.S. at 761 ("as of necessity, the 'wall' is not without bends"). *See Lynch*, 104 S. Ct. at 1359 ("The concept of a 'wall' of seperation is a useful figure of speech. . . . But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact results between church and state.");

and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom." *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 232 (1963) (Brennan, J., concurring) ("The inclusion of both restraints upon the power of Congress to legislate concerning religious matters shows unmistakably that the Framers of the First Amendment were not content to rest the protection of religious liberty upon either clause.").

Accordingly, we consider the limitations both clauses places on the state's legislative power in this case.[24]

Walz, 397 U.S. at 672 ("This is a 'tight rope' and one we have successfully traversed."); *Sherbert* v. *Verner*, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation. . . ."); *Abington*, 374 U.S. at 225 ("The breach of neutrality that is today a trickling stream may all too soon become a raging torrent. . . ."); *Everson*, 330 U.S. at 63 (Rutledge, J., dissenting) ("We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other."); *Cantwell*, 310 U.S. at 310 ("The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed."); *Catholic High School Association of New York* v. *Culvert*, 753 F.2d 1161, 1166 (2d Cir. 1985) ("If we allow the camel to stick its nose into the constitutionally protected tent of religion, what will follow may not always be controlled. Thus, we must now turn to the question of whether the camel can be kept firmly tethered outside.").

[24]"The Court has frequently applied the religion clauses in the educational context, *Bob Jones University* v. *United States*, 461 U.S. 574 (1983); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Stone* v. *Graham*, 449 U.S. 39 (1980); *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646 (1980); *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977); *Wolman* v. *Walter*, 433 U.S. 229 (1977); *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736 (1976); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Johnson* v. *Robison*, 415 U.S. 361 (1974); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Lemon* v. *Kurtzman (Lemon II)*, 411 U.S. 192 (1973); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Lemon* v. *Kurtzman (Lemon I)*, 403 U.S. 602 (1971); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *Board of Education of Central School* District No. 1 v. *Allen*, 392 U.S. 236 (1968); *School District of Abington* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *People of State of Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Everson* v. *Board of Education of Ewing Twp.*, 330 U.S. 1 (1947); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940) (overruled by *Barnette*); *Hamilton* v.

A.

Consideration of a challenge to governmental action under the Free Exercise Clause requires that first we identify the nature and extent to which the state action interferes with or burdens the free exercise of appellants' religious beliefs. *Alamo Foundation*, 105 S.Ct. at 1963; *United States* v. *Lee*, 455 U.S. 252, 256-57 (1982). "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Yoder*, 406 U.S. at 220. Second, "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Lee*, 455 U.S. at 257-58; *Yoder*, 406 U.S. at 214. Inherent in determining whether the limitation is essential to the governmental interest is consideration of whether accommodation by the state would "unduly interfere with fulfillment of the governmental interest," *Lee*, 455 U.S. at 259, and whether the governmental regulation is the "least restrictive means" of promoting the governmental interest. *Thomas* v. *Review Board of Indiana Employment Security*, 450 U.S. 707, 718 (1981); *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961). Accordingly, we consider the burden placed on appellants' religious beliefs by allowing the OCRC to exercise jurisdiction, the state's interest in enforcement of the Ohio Civil Rights Act, and the necessity of regulating DCS employment practices in order to promote the state's interest.

(a)

Several factors compel a conclusion that the burden on appellants' exercise of their religious beliefs by allowing the state to regulate the employment practices of a pervasively religious school is great.

Regents of University of California, 293 U.S. 245 (1934), finding two general categories of religion/education cases: attempts by the state to introduce religious activities into public schools and attempts by the state to provide aid to religious schools. *Nyquist*, 413 U.S. at 772. For a history of religious education in America, see *People of State of Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 212 (1948) (Frankfurter, J.). However, the instant case falls in neither of these categories but instead involves state interference in the religious activities of religious schools.

Foremost, perhaps, are the fundamental rights of Stephen and Camillia House, as parents, to choose the manner in which their children will be educated, especially with regard to religious values. This fundamental right has been recognized in circumstances where First Amendment concerns were not predominant. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35 (1925). In *Pierce*, the Court held that government, pursuant to the equal protection clause of the Fourteenth Amendment, may not compel attendance in public, as opposed to private, schools. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. These "additional obligations" "must be read to include the inculation of moral standards, religious beliefs, and elements of good citizenship." *Yoder*, 406 U.S. at 233. The contemporary Court has found that "*Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children." *Id.* This parental interest is particularly compelling combined with a free exercise claim. *Id.*,[35] *Grove* v. *Mead*

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[35]The Court has frequently recognized this parental interest in both religious and non-religious contexts. In *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), the Court held that a state law forbidding, in any school, the teaching of any language other than English to a child who has not passed the eighth grade, violated the Fourteenth Amendment's guarantee of liberty. The Court found that "education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto," and that the teacher's "right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment." *Id.* at 400. This due process right of parents existed independent of religious considerations. In *Pierce*, the Court invalidated a statute requiring that children attend public schools as interfering with "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. Further, in *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944), the Court reiterated "[t]he rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it." The function of the parent includes "preparation for obligations the state can neither supply nor hinder." *Id.* at 166. See also *Quick Bear* v. *Leupp*, 210 U.S. 50, 81-82 (1908) ("we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the Government is necessarily undenominational.").

The Court has more recently found the parental right of child rearing and education in the implied right of privacy, *Roe* v. *Wade*, 410 U.S. 113, 152-53 (1973), while expressing confusion regarding the source of such right, *Runyon* v. *McCrary*, 427

School District, 753 F.2d 1528, 1533 (9th Cir. 1985) ("The free exercise clause recognizes the right of every person to choose among types of religious training."); *Hamilton* v. *Regents of University of California*, 293 U.S. 245, 262 (1934) (religious liberty includes "the right to entertain the beliefs, to adhere to the principles and to teach the doctrines"). "[T]he Free Exercise Clause . . . recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." *School District of Abington* v. *Schempp*, 374 U.S. 203, 222 (1963). *Cf. Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968) ("There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."). *See also Norwood* v. *Harrison*, 413 U.S. 455, 461 (1973) ("a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice."). " [A] state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause." *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 788 (1973).

The claims of the Amish parents in *Yoder* are similar in kind to those of appellants in that the Amish parents objected to the values to which their children would be exposed in public high school, in the same way that appellants object to the state's attempt to regulate DCS hiring practices with the

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U.S. 160, 178 n.15 (1976). In *Runyon*, the Court found that "a parent's decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities" and that "parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction." *Id.* at 178. In *Yoder*, the Court emphasized that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Yoder*, 406 U.S. at 233. We do not evaluate this case under a due process challenge with respect to the parents' privacy rights since the parties have not raised such a claim.

result of coercing the school into retaining or hiring teachers whose lifestyles and actions conflict with the parents' basic religious beliefs.[26]

The tender ages of the children exposed to Linda Hoskinson likewise compels the conclusion that the state interference with DCS selection of religious role models constitutes a substantial burden on religious freedom. For, "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Yoder*, 406 U.S. at 213-14;[27] *Lemon I*, 403 U.S. at 616 ("This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly."); *Tilton*, 403 U.S. at 686.

Similarly, the importance of religion in the school's educational process and the unique role of the teacher in these religious schools further emphasizes the burdensome nature of the state's actions. *Catholic Bishop of Chicago*, 440 U.S. at 501; *Lemon I*, 403 U.S. at 617. The record clearly indicates that the school, parents, and teachers expect teachers to serve as examples to the students.[28] Superintendent Schindler testified that teachers previously had been discharged on account of their lifestyles, and the statement of the school's educational philosophy indicates that the student "interacts and is taught by parent and teacher models who are themselves born again and have this perspective on life."

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[26] In *Yoder*, the Amish "object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a worldly influence in conflict with their beliefs." 406 U.S. at 210-11. Further, "high school attendance with teachers who are not of the Amish faith — and may even be hostile to it — interposes a serious barrier to the integration of the Amish child into the Amish religious community." *Id.* at 211-12. From these premises, the Court found that the "conclusion is inescapable that secondary schooling . . . contravenes the basic religious tenets and practices of the Amish faith." *Id.* 218.

[27] *Yoder* dealt with secondary school age children from grades 8 and up, while it is uncontroverted that Hoskinson taught elementary school students.

[28] Hoskinson testified that "I try to have a consistent spiritual testimony. By doing this I feel that I can be an example to my students."

The record is replete with evidence that the educational process at DCS is suffused with religion.[29] The district court so found, and there is no evidence to the contrary.

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[29]Parent House testified:

> The coaches have a very high influence on the students, the participants. As a matter of fact, they are instructed not only in the game and in particularly teaching something that will allow the students to have what is called total release. That total release program basically is the participant, the athlete, viewing that Jesus Christ is, in fact, the audience and that everything he does on the athletic field should, in fact, be done that — with the understanding that Christ is actually watching them.
>
> Prior to every soccer game there is a period of prayer. That prayer is somewhat directed, at least in the first of the year when the athletes are somewhat immature in their ability to prayer, by the coach. But the coach encourages each one of the athletes to pray. And there is a time of — a session of prayer where the athletes, in fact, do have prayer, not only before the game but often time after half-time, and certainly after games, after each game.

Further, Paul Pyle, a teacher who had also attended DCS as a student, testified:

> But the two things I think stand out most in my mind was the influence of Godly teachers and the way those teachers influenced me to love and respect the word of God. I was exposed day after day to several teachers who loved God and who loved His word. And that influenced the way I love God and love His word.

Superintendent Schindler testified:

> We believe very strongly that the teacher's role in education is paramount. In fact, in the Bible, in Luke, Chapter 6, verse 4, it says that after the student has been fully taught, the student will be like the teacher. And that is not just head knowledge, that is life style. In fact, educationally speaking, we feel strongly that more education takes place, more learning takes place in the life style of the teacher than does the curriculum itself. And because of that, we are very, very strongly devoted to getting the right persons in the classrooms teaching to our students, especially if you look at our philosophy. And if I, as a parent, am responsible for my kids and their education, and I am going to be judged accountable some day for that, that it's important as a parent that I am confident that the teacher has control of the minds of my kids and that their philosophy is compatible with mine.

Also, Schindler testified:

> [T]he life style of a person is so crucial and important to what is taught and picked up in the classroom. Some educators have stated that better than ninety percent of the learning that takes place in the classrooms comes from the life style of the teacher. It's also been stated that no one lives out of or functions out of a philosophical vacuum, that we base every decision and the way we live based upon certain principles and certain authorities. And because of this, because it is so crucial, we take extra pains. In fact, I feel that one of my major responsibilities in the Dayton Christian School, as superintendent, is to make certain that the people selected to be on our staff are people whose life styles, whose commitment to Christ is compatible with what we want our kids to be taught.

Our conclusion that the OCRC's exercise of jurisdiction in this case is extremely burdensome on appellants' exercise of religion is significantly influenced by the affirmative and highly coercive nature of the state interference. The hallmark of a free exercise violation is the presence of coercion by the state.[30] *School District of Abington* v. *Schempp*, 374 U.S. 203, 223 (1963); *Engle* v. *Vitale*, 370 U.S. 421, 430 (1962); *Zorach* v. *Clauson*, 343 U.S. 306, 311 (1952).

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas, 450 U.S. at 717-18; *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). Similarly, when the state penalizes particular hiring practices with respect to an individual employed to

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[30]The danger of coercion by the state was recognized by James Madison, a drafter of the First Amendment, when he remonstrated against a bill proposed in the Virginia General Assembly "'establishing a provision for Teachers of the Christian Religion.'" *Everson* v. *Board of Education of Ewing Twp.*, 330 U.S. 1, 64 (1947). Madison opposed the law because "we hold it for a fundamental and undeniable truth, 'that Religion, or the duty which we owe to our Creator, and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.'" *Id.* (footnote omitted). Madison further found that the bill

> degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourage in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain repose from his troubles.

Id. at 69. For the complete text of Madison's *Memorial and Remonstrance Against Religious Assessments*, see *Everson*, 330 U.S. at 63. Further, Jefferson, in the Virginia Bill for Religious Liberty, recognized that "'even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern.'" *Id.* at 13.

provide religious instruction and act as a religious role model when the employment is governed by religious principles, a burden on religion exists.

Our assessment of the burden placed on appellants by the OCRC's exercise of jurisdiction begins with examination of the Commission's preliminary actions in this case.[31]. In response to the filing of Hoskinson's charge, the Commission sought from DCS blank employment applications, employee handbooks and rules and regulations, DCS written policy on disciplinary actions, employee pregnancies, employee evalu-

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[31]We recognize that an order of reinstatement or backpay is not at issue in this case. Appellants challenge only the OCRC's exercise of jurisdiction and its issuance of the complaint in this case. We examine, however, the entire statutory scheme, for perhaps a greater burden on appellants is the chilling knowledge that their selection of instructors to teach their children will be reevaluated, and, perhaps, adjusted by the state applying secular criteria. In *Catholic Bishop of Chicago* v. *NLRB*, 559 F.2d 1112, 1124 (1977), *aff'd on other grounds*, 440 U.S. 490 (1979), the court noted

> The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to "steer far wider of the unlawful zone" of impermissible conduct. . . . If, for example, a teacher should give a strong pro-union speech at a meeting one week, and the next week would advocate the cause of birth control to his or her students or favor the availability to poor people of abortion, the bishop would be confronted with a choice of foregoing his right to discharge the heretical employee or do so at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs.

Similarly, in *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 75-76 (1st Cir. 1979) (footnotes omitted), the court held

> It is not the obligation of the schools to prove as a precondition for relief at this time that this precise scenario, which hardly can be called speculative, in fact will unfold. To the contrary, in the sensitive area of First Amendment religious freedoms, the burden is upon the state to show that implementation of a regulatory scheme will *not* ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance. In cases of this nature, a court will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems.

See also Larson v. *Valente*, 456 U.S. 228, 241 (1982). The Court has consistently considered the effect of granting or denying an exception on the overall operation of the statute beyond the specific consequences of the pending case. *Lee*, 455 U.S. at 260.

ations, performance standards, contract renewal, grievance procedure, job descriptions, detailed information regarding all DCS employees who were pregnant from January 1, 1977 to date of request, similar information regarding all employees who were discharged and suspended, minutes of specific DCS Board meetings, and complete personnel files for 14 DCS employees. The Commission, in fact, early in the case used its investigative powers and asserted jurisdiction as coercive tools to compel appellants to relinquish the mandates of their consciences. In a letter of May 14, 1979, the OCRC Regional Director Rebecca Haley warned Schindler that "we encourage you to reconsider adjustment of this matter in lieu of a potentially costly and time consuming investigation." *See* note 31 *supra*. The OCRC likewise attempted to coerce DCS into acceptance of a Conciliation Agreement and Consent Order following the Commission's finding of probable cause. On January 28, 1980, Haley wrote, "the enclosed proposed Conciliation Agreement and Consent Order has been prepared to eliminate unlawful discriminatory practices and their efforts [sic] and to assure your voluntary compliance with Ohio's Laws Against Discrimination." Further, "[y]our refusal to meet with us as suggested . . . shall result in a determination being made by the Commission that conciliation efforts have failed. Such a failure will require the Commission to initiate formal proceedings against you or your organization."[32]

The Proposed Consent Order required that DCS bind itself and its successors and to stipulate "that the Commission has full and complete jurisdiction of the parties and subject matter herein." While noting that the employer does not admit to unlawful conduct, the Consent Order required that Hoskinson be fully reinstated with back pay, that DCS agree not to discharge Hoskinson with "just cause," and that DCS not retaliate against Hoskinson. The order required DCS to further agree to administer its policies without regard to its

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[32]We do not suggest that the OCRC's efforts against DCS were more coercive than against other employers. However, this fact is irrelevant since DCS asserts a free exercise claim rather than an equal protection claim.

employees' religion and that it not seek information about its employees' religion. The order also provided that "[r]espondent shall post in a conspicuous place or places on its premises, the Commission's mandatory notice which sets forth excerpts of Chapter 4112, Ohio Revised Code, and other relevant information." The order further provided:

> the Commission may conduct such compliance reviews during Respondent's normal business hours as the Commission believes to be warranted during the three (3) years subsequent to the issuance of this PROPOSED ORDER. Respondent agrees to furnish whatever information is required by the Commission in order to implement such reviews, and understands that upon failure to fully comply with any of the terms and conditions this PROPOSED ORDER the Commission may initiate further action including, but not necessarily limited to, the filing of a complaint for enforcement of this ORDER in an appropriate Court of Common Pleas.

It is clear that this relief not only collides with the principles underlying appellants' asserted religious beliefs, but could not be constitutionally compelled without running afoul of the First Amendment.[33]

Appellants have few options. They can abandon their religious beliefs by placing their children in public schools, compromise their hiring practices to conform with the state's secular interests rather than appellants' religious commands, or leave Ohio and seek another jursidiction in which appellants can maintain schools consistent with their religious principles.[34] The Ohio statute "affirmatively compels them, under threat of criminal sanction, to perform acts undeniably

[33]It would indeed be curious if the Establishment Clause prohibited the posting of religious commandments in a public school, *Stone* v. *Graham*, 449 U.S. 39 (1980), but the correlative scope of the Free Exercise Clause did not prevent the posting of secular commands, directly hostile to appellants' religion, in a parochial school.

[34]The Court has recognized that "[f]orced migration of religious minorities was an evil that lay at the heart of the Religion Clauses." *Yoder*, 406 U.S. at 218 n.9.

at odds with fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218;[35] *Sherbert*, 374 U.S. 402.

The OCRC's exercise of jurisdiction is burdensome on all parties to this action. While DCS primarily bears the expensive and time-consuming burden of answering the OCRC's charges, this burden is indirectly borne by the parents and churches which support DCS. Further, the congregations and parents are faced essentially with either supporting a school staffed by faculty who flout basic tenets of their religion or abandoning their support of Christian education altogether. The burden on the parents' exercise of religion is particularly onerous in light of the heightened parental interest in their children's education. Likewise, teacher Pyle, as an adherent of the school's educational and religious philosophies, finds his exercise of religion as a member of the faculty burdened by the OCRC's intrusion into the faculty-selection process and the imposition of secular guidelines for faculty retention.

The coercion inherent in the Ohio statute and the attendant OCRC exercise of jurisdiction is certainly more affirmative and compelling than that in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983). In *Bob Jones*, the Court upheld denial of tax exempt status to an institution which denied admission to those engaged in interracial dating. In weighing the schools' free exercise claim, the Court observed that "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious

[35]Appellants in *Yoder* were fined $5 each. Ohio law makes violation of Ohio Rev. Code Ann. § 4111.02(A) a third-degree misdemeanor, Ohio Rev. Code Ann. § 4112.99, punishable by sixty days imprisonment or a fine of not more than five hundred dollars, Ohio Rev. Code Ann. § 2929.21(B) (3), (C) (3). While these penalties are not insubstantial, we note that the more coercive, and thus constitutionally impermissible, penalty inheres in the threat of prosecution represented by the OCRC's attempt to exercise jurisdiction in this case to punish actions based on patently religious grounds. Likewise, in *Yoder*, the impermissible coercion rested in the state's attempt to compel attendance by Amish children in public high schools rather than in the $5 fine. *Wooley* v. *Maynard*, 430 U.S. 705, 710 (1977) ("When a genuine threat of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights.").

tenets." *Id.* at 603-04. In the instant case, however, appellants do not have the luxury of simply declining a public benefit. While Bob Jones University is free to continue to practice its religious beliefs free of state intervention, appellants only have the option of either conforming their religiously based employment practices to the secular guidelines promulgated in the Ohio statute or face continued harrassing prosecution by the OCRC. This result is inevitable in light of the absence of a statutory exemption in the Ohio statute, *see* note 18 *supra*, and the Commission's rejection of the religious interests as bars to exercise of its remedial powers.[36] Accordingly, we conclude that the OCRC's exercise of jurisdiction over the complaint against DCS affirmatively and coercively burdens appellants' exercise of their religious beliefs and their attempts to instill such in their offspring.

(b)

The state, in pursuit of a compelling interest, may burden religious practices. *Lee*, 455 U.S. at 257; *Reomer*, 426 U.S. at 745; *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); *Sherbert*, 374 U.S. at 403-04; *Braunfeld*, 366 U.S. at 603; *Cantwell*, 310 U.S. at 304, 306; *Davis* v. *Beason*, 133 U.S. 333, 342 (1890) (one may "exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others");[37] *Reynolds* v. *United States*, 98 U.S. 145,

[36]The Commission's complaint states that "[e]vidence does not indicate that the Ohio Civil Rights Commission lacks jurisdiction over Respondent because it is a religious institution."

[37]
> It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.

Beason, 133 U.S. at 342-43.

164 (1878) (Congress may prohibit "actions which were in violation of social duties or subversive of good order," polygamy).[38] However, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215; *Barnette*, 319 U.S. 624, 639 (1943) (freedom of religion "susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.").

Whether the state's interest is compelling is often judged by reference to state law. *Roberts* v. *United States Jaycees*, 104 S. Ct. 3244, 3253 (1984). Although the absence of legislative history hampers our assessment of the state's interest, the statute equally prohibits discrimination based on race, color, religion, handicap, sex, age and national origin. In *Roberts*, the Court found that the "stigmatizing injury, and the denial of equal opportunities that accompanies it" is as serious when the discrimination is based on sex as when it is based on race, *Roberts*, 104 S. Ct. at 3254, and that the government has a compelling interest in eliminating "discrimination in the distribution of publicly available goods, services,

[38]In *Reynolds*, the Court sought to define the scope of protection of religious freedom by reference to a bill for establishing religious freedom drafted by Jefferson.
> In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

98 U.S. at 163. The Court found that to excuse a man's acts as religious practices would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Id.* at 167.

and other advantages," *id.* at 3255.[39] Accordingly, we recognize the state's interest as substantial and compelling.

The state also asserts its interest in prohibiting conduct encompassed by the statute's prohibition on discriminating against an employee who opposes unlawful actions. Ohio Rev. Code § 4112.01(I). This state interest is likewise compelling since, if employees were prohibited from opposing discrimination, the effectivenss of the employment discrimination laws would be substantially impaired. One court has found the government interest in preventing retaliation compelling since citizens have "a constitutional right to inform the government of violations of federal law." *Pacific Press*, 676 F.2d at 1280. As we construe it, the First Amendment provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." Of course, the right to petition, even as part of the due process guaranteed by the Fourteenth Amendment, applies only to actions by federal or state government which abridge the right to petition and does not reach private actions.

Finally, we note that although the asserted state interests may be compelling, the state is not constitutionaly compelled to enact the statute at issue here. The Constitution prohibits neither private sex discrimination nor private abridgment of the First Amendment right to petition. The state interests at issue here differ markedly from those asserted in *Bob Jones*. In that case, the Court found that "the governmental interest is in denying public support to racial discrimination in education." *Bob Jones University*, 461 U.S. at 604 n.29. Certainly, denial of public support to discrimination is a more

[39]We note that while *Roberts* spoke of discrimination in regard to "publicly available goods," public resources are not implicated in this case. With specific respect to sex discrimination, we also note that the equal protection standard of scrutiny with respect to race discrimination is stricter than that for sex discrimination. *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Further, though not dispositive of the state's interest in eliminating discrimination based on sex, Congress has not found application of the employment discrimination laws to the religious activities of religious institutions necessary or essential to accomplishing the national interest in eliminating discrimination. *See* 42 U.S.C. §§ 2000e-1, 2000e-2(e) (2).

compelling interest than eliminating discrimination in the private sector, for the Constitution, through the Fourteenth and Fifth Amendments, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), affirmatively compels denial of governmental aid to discrimination, *Norwood* v. *Harrison*, 413 U.S. 455 (1973)[40] (state aid to private schools that discriminate violates fourteenth amendment.). Accordingly, the governmental interest in *Bob Jones* was greater than in the instant case.

(c)

The Ohio Civil Rights Act places a heavy burden on appellants' exercise of their religious beliefs, and, although the state's interest is substantial, that interest does not justify such a broad and onerous limitation. The state legislation must be "essential," "necessary," and the least drastic means to further the state's interest. *Minersville School District* v. *Gobitis*, 310 U.S. 586, 595 (1940) (overruled in *Barnette)* ("essential"); *Sherbert*, 374 U.S. at 407; *McCurry* v. *Tesch*, 738 F.2d 271, 275-76 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1180 (1985).

Just as the principle of neutrality guides our inquiries pursuant to the Establishment Clause, accommodation distinguishes our consideration of Free Exercise claims. *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1359 (1984) (Constitution "mandates accommodation, not merely toleration");[41] *Girouard* v. *United States* 328 U.S. 61, 68 (1946). Accommodation of the religious beliefs in this case would not significantly interfere

[40]We note that Runyon v. McCrary, 427 U.S. 160 (1976), construing § 1981, did not "present the application of § 1981 to private sectarian schools that practice *racial* exclusion on religious grounds." *Id.* at 167 (footnote omitted). Therefore, free exercise interests were not implicated. *Id.* at n.6.

[41]While concluding like other courts that the Free Exercise Clause may in some circumstances compel an exemption to employment discrimination laws, *EEOC* v. *Mississippi College*, 626 F.2d at 485, we also recognize "the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." *Yoder*, 406 U.S. at 220-21. We reject this danger for two reasons. First, exceptions necessary to vindicate free exercise rights have overwhelmingly been upheld despite Establishment Clause concerns in light of the important values protected by the Free Exercise Clause. *Id.*; *Sherbert*, 374 U.S. at 409; *Abington*,

with the state's fulfillment of its goal of eradicating discrimination in employment. The state would still be able to regulate the employment practices of non-religious institutions and would be able to regulate the employment practices of religious institutions except where religious belief is implicated. Further, it is clear that less burdensome alternatives such as the denial of the tax exemptions as in the *Bob Jones University* case or denial of the use of public school bus transportation are available to help the state accomplish its goal while reducing interference with the exercise of religion. While the record reveals that bus transportation is the only public benefit DCS claims to receive, Ohio Rev. Code Ann. § 3327.01, it is clear that state law provides several other benefits such as textbooks, speech and hearing diagnostic services, physician, nursing, dental and optometric services, and diagnostic psychological services, Ohio Rev. Code Ann. §§ 3317.02.4(P), 3317.06. Likewise, while the record does not detail DCS tax status, the Ohio tax code provides several possible tax exemptions. Ohio Rev. Code Ann §§ 5709.04,

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374 U.S. at 295 (Brennan, J., concurring); *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

Second, due to the burden on religion necessary to prove a free exercise claim, the granting of an exception invariably involves less entanglement between church and state than does application of the statute to the religion, absent such an exception. *Widmar* v. *Vincent*, 454 U.S. 263, 269-70 (1981); *Nyquist*, 413 U.S. at 793 (property tax exemption "was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and States."). In this case, as we establish *infra* at 54, application of the statute to DCS with the necessary inquiries into the difficult factual questions of intent, belief, pretext, and motivation involves substantial entanglement between religion and the state. While an exemption for action taken on religious grounds by religious institutions with respect to religious activities may require some entanglement, the degree of entanglement is certainly less than if the statute and the OCRC's full panoply of investigative and remedial powers were applied full force. The Establishment Clause prevents only excessive entanglement. The accommodation reflected in such an exemption is nothing more than the neutrality that the Establishment Clause compels. *Yoder*, 406 U.S. at 234-35 n.22. See also *Gillette* v. *United States*, 401 U.S. 437, 461 (1971); *Walz*, 397 U.S. at 673 ("The limits of permissible state accommodation to religion are by no means co-extensive with the r.oninterference mandated by the Free Exercise Clause."). Since the district court determined that the religious beliefs asserted were sincere and were the reason for the employment decisions at issue, we leave to another case the extent to which the OCRC may inquire into causation and sincerity in detetermining whether the employment situation at issue is exempt from OCRC regulation.

5709.07, 5709.12. Accordingly, the state might further its interest in eliminating sex discrimination by conditioning receipt of these benefits on compliance with the Ohio Civil Rights Act. Therefore, the state could advance its own compelling interest while imposing a lesser burden on appellants' religious beliefs.

We hold that allowing the OCRC to assert jurisdiction over the instant complaint against DCS when such complaint is based on conduct pursuant to admittedly sincerely held religious beliefs and where the Ohio Civil Rights Act makes no provision for accommodation of those beliefs, unduly burdens the plaintiffs' right to free exercise of religion. This heavy budren and the coercion that naturally results compels the conclusion that the statute cannot constitutionally be applied to DCS. The fact that the Houses' religious beliefs conflict with important secular tenets does not require a different result, for "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 642.

We note the admonition of the Court that "in safeguarding conscience we are dealing with interest so subtle and so dear, every possible leeway should be given to the claims of religious faith." *Gobitis*, 310 U.S. at 594; *Braunfeld*, 366 U.S. at 605 (making accommodation is a "delicate task"); *Braunfeld*, 366 U.S. at 610 (Brennan, J., dissenting) ("[T]he rights of conscience are, in their nature, of peculiar delicacy; and will little bear the gentlest touch of governmental hand." I Annals of Cong. 730 (Remarks of Rep. Daniel Carroll, August 15, 1789)). Further, "the Constitution may compel toleration of private discrimination in some circumstances." *Norwood*, 413 U.S. at 463; *King's Garden, Inc.* v. *FCC*, 498 F.2d 51, 56 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1972). Concluding that this is the most compelling of such circumstances, we reverse.

B.

Appellants also contend that application of the Ohio Civil Rights Act to DCS violates the Establishment Clause. Noting that the Free Exercise and Establishment Clauses are but two aspects of one essential freedom, we consider appellants' assignment of error. At the outset, we note that appellants' religious beliefs are sincerely held and that DCS discharged Hoskinson because of those beliefs. These facts, not appealed by the OCRC as clearly erroneous, were found by the district court.

The Court has eschewed rigidity in Establishment Clause analysis.[42] It is clear, however, that the prohibitions which the clause represents apply equally to government benefits to and burdens on religion. *Lynch*, 104 S. Ct. at 1362; *Bob Jones University*, 461 U.S. at 604; *Pacific Press Publishing Co.*, 676 F.2d at 1281; *Southwestern Baptist Theological Seminary*, 651 F.2d at 286; *Mississippi College*, 626 F.2d at 486. The Court has enunciated the guidelines for implementing the clause's purpose as follows.

> In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." . . . The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase

[42]

> There are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired . . . [W]e can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Tilton, 403 U.S. at 678.

> or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."
>
> In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. . . . But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.

Lynch, 104 S. Ct. at 1361-62 (citations omitted); *Alamo Foundation*, 105 S. Ct. at 1964; *Mueller* v. *Allen*, 103 S. Ct. 3062, 3066 (1983) (tax deductions for school expenses); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982); *Larson* v. *Valente*, 456 U.S. 228, 252 (1982); *Stone* v. *Graham*, 449 U.S. at 40; *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980); *Wolman* v. *Walter*, 433 U.S. 229, 236 (1977) (school aid); *Meek* v. *Pittenger*, 421 U.S. 349, 358 (1975); *Lemon I*, 403 U.S. at 612-13;[43] *Walz*, 397 U.S. at 669 (property tax exemption); *Abington*, 374 U.S. at 222 (Bible reading); *Engel*, 370 U.S. 421 (school prayer); *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961) (Sunday closing law); *Braunfeld*, 366 U.S. at 607 (Sunday closing laws). *See also Bradfield* v. *Roberts*, 175 U.S. 291, 297 (1899). With little hesitation, we can affirm the district court's conclu-

[43] In *Lemon I*, the Court also cited, as a basis for a finding of entanglement, the divisive political potential of government aid to parochial schools, 403 U.S. at 622-24. The scope of the inquiry into political divisiveness has been subsequently limited "to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." *Mueller*, 103 S. Ct. at 3071 n.11.

> Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion. But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the *Lemon* test is properly limited to institutional entanglement.

Lynch, 104 S. Ct. at 1367 (O'Connor, J., concurring). See, however, *Lynch*, 104 S. Ct. at 1374 n.9 (Brennan, J., dissenting).

sions that the statute has a secular purpose and does not have the primary effect of advancing or inhibiting religion. However, a secular purpose and facial neutrality are not sufficient to avoid conflict with the Establishment Clause. *Stone* v. *Graham*, 449 U.S. 39, 40-41 (1980); *Roemer*, 426 U.S. at 747; *Nyquist*, 413 U.S. at 774, 783 n.39. Therefore, our inquiry focuses on whether the statute fosters excessive entanglement between religion and government.[44]

"Entanglement is a question of kind and degree." *Lynch*, 104 S. Ct. at 1364. "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz*, 397 U.S. at 675. In assessing entanglement, we consider the character of the institution affected, the type of burden placed upon that institution, and the resulting church-state relationship. *Lemon I*, 403 U.S. at 615. These considerations mirror the three levels at which religion is involved in this case. First, the institution, the school, is pervasively religious. Second, the activity being burdened — the teaching of students and hiring of teachers — are in this case pervasively religious activities. Third, the point at which the state attempts to interject itself, thereby creating the church-state relationship,

[44]The opinions of the Court and writings of the drafters reveal the values underlying the clause.

> Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permits its "unhallowed perversion" by a civil magistrate.

Engel v. *Vitale*, 370 U.S. at 431-32 (footnotes omitted). Madison remonstrated against government involvement arguing that "it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects." *Everson*, 330 U.S. at 69. *See also Epperson*, 393 U.S. at 103-04.

is in the hiring decision, a decision which the school superintendent testified is made using almost exclusively religious criteria. We consider each of these points.

First, as we have discussed fully above, DCS is a pervasively religious school, admits only Christians, applies religious criteria in hiring faculty, and includes indoctrination of students as a substantial purpose of its existence. *Tilton*, 403 U.S. at 686-87; *Lemon I*, 403 U.S. at 616-618 ("The substantial religious character of these church-related schools gives rise to entangling church-state relationships. . . ."); *Everson*, 330 U.S. at 33 (Rutledge, J., dissenting) ("daily religious education commingled with secular is 'religion'"); *Volunteers of America-Minnesota-Bar None Boys Ranch* v. *NLRB*, 752 F.2d 345, 348-49 (8th Cir. 1985), *petition for cert. filed*, 53 U.S.L.W. 3759 (April 23, 1985). "[T]he degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution." *Hunt* v. *McNair*, 413 U.S. 734, 746 (1973); *Meek* v. *Pittenger*, 421 U.S. at 366. Therefore, the religious permeation of DCS indicates that state intervention is likely to result in a high degree of entanglement.

Second, the character of the activity the state seeks to affect — the employment of the teaching staff — necessarily involves the state in regulating ideological resources of the school. *Tilton*, 403 U.S. at 687. The fact that the state seeks to regulate teachers necessarily implicates religious concerns.[45] *Lemon I*, 403 U.S. at 617. If anything, the Court's decisions regarding state aid to parochial schools establish that teachers are not religiously neutral. *Id. See New York* v. *Cathedral Academy*, 434 U.S. 125 (1977);[46] *Meek*, 421 U.S. at 372; *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472, 480 (1973); *Allen*, 392 U.S. at 248. *See also Catholic*

[45]Our holding is limited to the hiring decision and religious context presented in this case. We express no opinion with respect to the appropriateness of state efforts to prescribe particular qualifications for parochial school teachers.

[46]While admittedly the instant case involves an inquiry different from that in *Cathedral Academy* that case emphasizes that intrusions into the teaching function of parochial schools is likely to be entangling.

Bishop, 440 U.S. at 501 ("The key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools."); *NLRB* v. *Bishop Ford Central Catholic High School,* 623 F.2d 818, 822 (2d Cir. 1980), *cert. denied,* 450 U.S. 996 (1981) ("It is the commitment of the faculty to religious values no matter what subject in the curriculum is taught and the obligation to propagate those values which provides the risk of entanglement."). *See Donovan* v. *Central Baptist Church, Victoria,* 96 F.R.D. 4 (S.D. Texas 1982). Therefore, this element of the entanglement inquiry indicates that a high degree of entanglement is likely. *Compare Donovan* v. *Tony and Susan Alamo Fdn.,* 722 F.2d 397, 402 (8th Cir.), *aff'd,* 105 S. Ct. 1953 (1985) ("These [record keeping] requirements apply only to commercial activities undertaken with a 'business purpose,' and would therefore have no impact on petitioners' own evangelical activities or on individuals engaged in volunteer work for other religious organizations.")

Third, as long as DCS is in existence, the OCRC may exert jurisdiction over employment disputes, thereby creating a continuing relationship, rather than a one-time state-church encounter. *Tilton,* 403 U.S. at 688. This fact, along with the types of records the OCRC seeks and the Commission's subpoena power, create the likelihood that allowing the Commission to exercise jurisdiction will result in the "comprehensive, discriminating, and continuing state surveillance" of which the Court disapproved in *Lemon I,* 403 U.S. at 619. Further, the fact that the Commission will often be

> [D]etailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim.

434 U.S. at 132-33.

required to decide questions of intent, motive, causation, and pretext necessarily involves the state in assessing religious decisions. Such state involvement "is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches." *Lemon I,* 403 U.S. at 620. In *Walz,* the Court, in upholding a property tax exemption for property used for religious worship, rejected, on grounds of entanglement, conditioning such exemption on social welfare work by the churches.

> To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Walz, 397 U.S. at 674.[47] *See Wolman* v. *Walter,* 433 U.S. 229, 254 (1977).

The conclusion that the Commission's assessment of DCS teacher employment decision is impermissibly entangling is compelled particularly by cases assessing the constitutionality of applying labor relations statutes to parochial schools. In *Catholic Bishop of Chicago* v. *NLRB,* 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds,* 440 U.S. 490 (1979), the court concluded that exercise of jurisdiction by

[47] "Obviously the more discriminating and complicated the basis of classification for an exemption — even a neutral one — the greater the potential for state involvement in evaluating the character of the organizations." *Walz,* 397 U.S. at 698-99 (Harlan, J., concurring). *See also Gillette* v. *United States,* 401 U.S. 437, 457 (1971). It is clear that state involvement in resolution of doctrinal issues is absolutely prohibited. *Jones* v. *Wolf,* 443 U.S. 595, 602-04 (1979); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696, 714-15 (1976).

the NLRB over labor disputes among parochial school teachers fosters impermissible entanglement. The court stated:

> We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.

Id. at 1125 (if the reason for discharge were invalid under church doctrine, this would indicate that the reason asserted for discharge, the religious belief, was pretextual).[48] Further, the Supreme Court, although affirming on different grounds, found that application of the statute to parochial schools presented a significant risk of infringing the First Amendment. The Court found that "[i]nevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts

[48]It is further open to question whether as a practical matter a distinction could be drawn between discrimination based on an unlawful purpose and discrimination compelled by a religious belief.

As appellants argue, *"[r]eligious* liberty may embrace forms of discrimination on account of *sex*. As a matter of *religious* principle Dayton Christian Schools . . . refuses to classify the sexes as identical. . . . " App. at 128. Clearly, "a belief can be both secular and religious. The categories are not mutually exclusive." *Wiggins* v. *Sargent*, 753 F.2d 663, 666 (8th Cir. 1985) (footnote omitted). "The first amendment presumably protects the area where the two overlap. . . . We believe that in this case the fact that the notion of white supremacy may be, and perhaps usually is, secular, in the sense that it is a racist idea, does not necessarily preclude it from also being religious in nature, in the sense that it may be based upon a literal interpretation of Biblical teachings." *Id.* at 666-67 (footnote omitted).

with negotiators for unions." 440 U.S. at 503. Noting that the schools involved had argued that "their challenged actions were mandated by their religious creeds," *id.* at 502, the Court found that

> The resolution of such charges by the Board, in many instances will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Id. (footnote omitted).[49]

[49]A conclusion at odds with *Catholic Bishop*, was reached by the Second Circuit in *Catholic High School Association of Archdiocese of New York* v. *Culvert*, 753 F.2d 1161 (2d Cir. 1985) in concluding that the First Amendment did not prohibit a state labor relations board from exercising jurisdiction over labor relations between parochial schools and their lay teachers. *Culvert*, a 2-1 decision, is factually distinguishable because no religious belief was implicated. The court rested its conclusion that entanglement was not excessive on the fact that Board orders were not self-enforcing, and the Board could not compel parties to agree but only to bargain in good faith. *Id.* at 1167. However, when a refusal to bargain is based on a religious belief in one's bargaining stance on a particular issue, the state will necessarily be required to inquire into issues of good faith and the validity of a party's interpretation of their religious belief. This is the type of inquiry disapproved in the *Catholic Bishop* cases. To hold that a state may constitutionally compel parties to bargain in derogation of religious beliefs seems a particularly peculiar construction of the First Amendment. The court further reached the inexplicable conclusion that although "the First Amendment prohibits the State Board from inquiring into an asserted religious motive to determine whether it is pretextual," the Board "is still free to determine, using a dual motive analysis, whether the religious motive was in fact the cause of the discharge." 753 F.2d at 1168. Since pretext is essentially an inquiry into causation, this appears to be a distinction without a difference. Nevertheless, even if some principled distinction can be drawn, we fail to see that this would appreciably diminish the level of likely entanglement. Once the OCRC is denied the authority to inquire into issues such as pretext it becomes a "toothless tiger" rendering any exercise of jurisdiction illusory since such jurisdiction would be meaningless. Any inquiry into causation in the particularly compelling religious environment of this case involves excessive state/church entanglement in light of the fact that almost all DCS employment decisions are made on religious grounds.

The district court's factual findings and much of its analysis compels us to find excesive entanglement in this case. The court stated:

> Should an individual . . . charge that the religious reasons given for dismissal were but a pretext for sex, race, or some other form of unlawful discrimination, then the Commission would have to evaluate the subjective sectarian decision to determine if it was properly made or if the real reason for dismissal was some form of prohibited discrimination.
>
> . . .
>
> Within this procedural framework exists the potential for the Commission to evaluate sectarian decisions, in the context of hearings and investigations, to prohibit adherence to, or at least actions based upon religious tenets, and, in fact, to require the posting of anti-discrimination statements that may run contrary to the members' religious beliefs. In a school which attempts to permeate every lesson and activity with its religious principles and values, such potential intrusion by the state squarely presents a risk of impermissible state entanglement and interference with the members' religious beliefs and practices.

578 F. Supp. at 1022-23.

The Establishment Clause "prohibition was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief." *Abington,* 374 U.S. at 234 (Brennan, J., concurring.). The statute in this case, as applied by the OCRC, clearly operates to discourage the practice of religious belief. The district court discounted this prospective state/church entanglement on the ground that only a hearing was involved at this point. However, the OCRC's aggressive pursuit of DCS raises a "realistic likelihood," *Hunt,* 413 U.S. at 747, that not

only are the impermissible entanglements of the hearing itself implicated, but, rather, the entire panoply of statutory entanglements from the proposed consent order to the spector of judicial enforcement proceedings must be considered.[50] Entanglement is all the more likely in light of the OCRC's preliminary finding of probable cause. The district court also rejected appellants' claims by finding that the OCRC will only rarely be required to involved DCS in Commission proceedings. However, "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of constitutional guarantees against religious establishment, and it cannot be dismissed by saying that it will happen only once." *Cathedral Academy,* 434 U.S. at 133.

Accordingly, we conclude that allowing the OCRC to exercise jurisdiction over employment discrimination charges against DCS necessarily results in an excessive state/church entanglement due to the issues of good faith and motivation necessarily raised in such proceedings, the pervasively religious nature of the Christian school, the particularly sensitive role of the teacher in explicitly and implicitly fostering the religious beliefs and values that appellant-parents seek for their children, and the fact that religious considerations pervade the hiring scheme employed by DCS.[51] Therefore, we conclude that application of the Ohio Civil Rights Act in this context impermissibly entangles the state in issues of faith in violation of the Establishment Clause of the First Amendment.

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[50]The district court's concerns that conclusions reached by the OCRC are, at this point, hypothetical is properly answered by the Court's comment in *Catholic Bishop* , that "[i]t is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502 (footnote omitted); *Catholic Bishop,* 559 F.2d at 1123 ("the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools. No longer would the bishop be the sole repository of authority as required by church law.").

[51]We note that most jurisdictions avoid these possible entanglements by exempting religious institutions from compliance with employment discrimination laws. *See* note 18, *supra.*

V.

> To be entitled to permanent injunctive relief from a constitutional violation, a plaintiff must first establish the fact of the violation. . . . He must then demonstrate the presence of two elements: continuing irreparable injury if the injunction does not issue, and the lack of an adequate remedy at law. . . . If the plaintiff makes such a showing, the court may grant injunctive relief, but the relief must be no broader than necessary to remedy the constitutional violation.

Newman v. *State of Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). *See Lemon II*, 411 U.S. at 200-01; *Christian Schmidt Brewing Company* v. *G. Heileman Brewing Company*, 753 F.2d 1354 (6th Cir. 1985) (preliminary injunction); *Detroit Newspaper Publishers Association* v. *Detroit Typographic Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972), *cert denied*, 411 U.S. 967 (1973).

In this case, appellants have established that their First Amendment rights would be violated by allowing the OCRC, in light of the record before the district court, to assert jurisdiction over DCS employment practices premised on religious beliefs. In granting an injunction pending appeal, the district court found that "[i]f the proceedings before the OCRC go forward, Plaintiffs face the permanent loss of First Amendment rights, rather than their loss for a minimal period of time." In light of our conclusions today, it is clear that appellants would be irreparably harmed if an injunction is not entered, and would have no adequate remedy at law.

Accordingly, the judgment of the district court is REVERSED and the case REMANDED for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-3124

DAYTON CHRISTIAN SCHOOLS, INC., et al.,
Plaintiffs-Appellants,

v.

OHIO CIVIL RIGHTS COMMISSION, et al.,

Defendants-Appellees.

Before; CONTIE and MILBURN, Circuit Judges; and
PECK, Senior Circuit Judge

[Filed June 26, 1985]

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded for proceedings consistent with this opinion.

It is further ordered that the Plaintiffs-Appellants recover from Defendants-Appellees the costs on appeal, as itemized

below, and that execution therefor issue out of said District Court, if necessary.

Entered by order of the Court
John P. Hehman, Clerk

Issued as Mandate: July 18, 1985

COSTS: (Recovered by appellants)
Filing Fee: ..... $ 70.
Printing: $1043.73
Total $1113.73
A True Copy.
Attest:
Gary McCarthy
Deputy Clerk

CASE NO. C-3-80-410

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

DAYTON CHRISTIAN SCHOOLS, et al.

Plaintiffs,

v.

OHIO CIVIL RIGHTS COMMISSION, et al.

Defendants.

DECISION AND ENTRY DENYING PLAINTIFFS' REQUEST FOR A PERMANENT INJUNCTION; JUDGMENT TO BE ENTERED FOR DEFENDANTS; TERMINATION ENTRY

[Filed January 6, 1984]

The merits of the captioned cause are presently before the Court for a determination of whether a permanent injunction should be issued against the Ohio Civil Rights Commission ("OCRC" or "Commission") to enjoin it from investigating and conducting a hearing on a charge of sex discrimination and retaliatory employer practices against the Dayton Christian Schools (DCS) leveled by a former teacher, Mrs. Linda Hoskinson.

Counsel for the parties agreed to consolidate the hearing on Plaintiffs' request for a preliminary injunction with the hearing on the merits of the captioned cause, pursuant to Fed. R. Civ. P. 65(a) (2).

Plaintiffs consist of DCS as an entity; Patterson Park Church; Christian Tabernacle; Calude E. Schindler, superintendent of DCS: Stephen T. House, M.D. (School Board Member at DCS), and his wife, Camilla House, parents; and

Paul Pyle, a teacher at DCS. Defendants are the Ohio Civil Rights Commission, its Commissioners, two Directors of the OCRC, and the Attorney General and Assistant Attorney General of Ohio. All Plaintiffs allege that their first amendment rights to freedom of religion will be violated if the OCRC is permitted to exercise jurisdiction over the school. The complexity of the problem presented to the Court stems from the pervasively religious orientation of DCS and the need to determine if the state's attempt to regulate an aspect of the operation of that school impermissibly runs afoul of the proscriptions set forth in either the free exercise or establishment clauses of the First Amendment to the United States Constitution.

The issue before this Court is whether the OCRC may exercise jurisdiction over DCS to investigate and to conduct a hearing on a charge that the school discriminated on the basis of sex and/or engaged in prohibited retaliatory employer practices when it terminated a female teacher's employment contract. Having conducted a hearing on this matter and having carefully reviewed the evidence and the arguments presented by the parties, the Court, as set forth in the opinion below, finds that a permanent injunction should not issue and therefore denies Plaintiffs' request for same.

I. FINDINGS OF FACT

A. PURPOSE AND MISSION OF DAYTON CHRISTIAN SCHOOL

Dayton Christian Schools, Inc., is a private nonprofit corporation that provides education both to elementary and high school students (Exhibit 1, page 71 1B07). The exhibits and testimony introduced at the hearing on this matter all support the finding that, from its inception, DCS has had a dominant religious purpose which permeates both the administrative and substantive aspects of the school. When first incorporated, the school outlined its purpose and objectives as follows:

(1) Principle purpose . . . is to provide a program of education in a positive Christian atmosphere offering regular courses of study in compliance with the laws and regulations of the State of Ohio.

(2) Other purposes and objectives are:

(A) to provide for the students and faculty (an) . . . environment commensurate with an institution having ultimate objectives which are Christ-centered.

(B) to teach all subjects in a manner to create in each student an awareness of God's Supreme authority over all creation.

(C) to present the Bible, God's Word, as the only reliable and true revelation of God's nature and His redeeming purpose and will for mankind.

(D) to teach that the Lord Jesus Christ is the Son of God who came to earth to die for our sins.

(E) to train and prepare youth to make worthy contributions to the Cause of Christ in the home, church and community.

(F) to help each student aspire to positions of responsibility in full or part-time Christian service, wherever that call for service may be.

(Exhibit 1, Page 71 1B06).

The preamble to the Constitution of Dayton Christian Schools, Inc. further delineates the school's religious purposes:

The corporation will provide an educational curriculum of the highest possible standards in order to prepare

students for purposeful Godliness . . . each student will be taught Christian Doctine based on the Bible as the textbook authority for such instruction and learning.[1]

(Exhibit 1, Page 71 1C01).

As an administrative means of insuring continued efforts toward the pronounced goals, both the original and current constitution of the Dayton Christian Schools, Inc. delineate a Statement of Faith of religious precepts to which each member of the Board of Directors and educational staff is required to subscribe yearly. (Exhibit 23: Statement of Faith executed by Linda Hoskinson on April 17, 1978).[2]

Woven throughout most of the Plaintiff's exhibits introduced at the hearing is the advocation of the religious philosophies and purposes of Dayton Christian Schools, Inc., as evidenced by the following compilation of exhibits.

[1]These purposes are carried through to the present as reflected in Exhibit 2 which is the current constitution of the Dayton Christian Schools, Inc., and contains identical wording.

[2]The Statement of Faith provides:

(1) I believe the Bible to be the inspired and the only infallible authoritative Word of God.
(2) I believe that there is one God, eternally existent in three persons: Father, Son, and Holy Spirit.
(3) I believe in the deity of our Lord Jesus Christ, in His Virgin Birth, in His sinless life, in His Miracles, in His vicarious and atoning death through His shed blood, in His Bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory.
(4) I believe that man is sinful by nature and that regeneration by the Holy Spirit is essential for his salvation.
(5) I believe in the continuing ministry of the Holy Spirit, by whose indwelling the Christian is enabled to live a Godly life.
(6) I believe in the resurrection of both the saved and the lost. They who are saved unto eternal life and they who are lost unto eternal damnation.
(7) I believe in the spiritual unity of believers in our Lord Jesus Christ.
(8) I believe in the creation of man by the direct Act of God.

(1) Dayton Christian Schools is an inter-denominational ministry offering a Christ-centered education . . . our goal is to provide a quality educational program that is based upon the Word of God (Exhibit 3, Page 1; cover letter to employment candidates);

(2) The entire process of education is seen as a means used by the Holy Spirit to bring the student into fellowship with God . . . to assist him in developing a Christian mind . . . to train him in Christ-likeness (Exhibit 21, Page 5: Teacher's Manual);

(3) The authority for such an education comes from God's command . . . the Christian School is an extension of the local evangelical fundamental church's Christian education program (*Id.*);

(4) In a Christian School, all studies and activities should be God-center . . . creating and developing a Christian mind is a foremost goal of the Christian School (*Id.* at Page 7);

(5) [the purpose is] to nourish dedicated disciples of our Lord Jesus Christ (*Id.* at Page 57);

(6) We feel strongly that according to God's Word, all Christian children belong in an educational system where Jesus Christ is preeminent (Collossians 1:18) (Exhibit 8: cover letter to parents).

The testimony of Claude Schindler, Superintendent of Dayton Christian Schools, Inc., identified the religious background from which the school emerged (T.23) and substantiated that its purpose and mission are based upon religious precepts found in the Bible and carried out in such a manner so as to achieve a religious goal.

In the Bible, Deuteronomy, Chapter 6, Verses 5 through

7, parents are commanded to diligently train their children to love thy God with all their heart, soul and mind every moment of the day.

We feel that the instruction we must give our children is there can't be any differentiation between secular and sacred, that God Himself is the center of all aspects of learning and everything that's God's (T.32).

And thus, our mission at Dayton Christian Schools is, in essence, to be a servant to the home and to help Mom and Dad fulfill their Godly responsibilities.

And that being our mission it then centers—then forms into the philosophy of education. And that philosophy is that our mission, our goal, is to help these young people become like Jesus Christ, to think like Him, to act like Him by demonstrating their characters and qualities in their lives. We believe that is crucial, that a Christian becomes like Him. And thus, He becomes the focus in everything we do in our school (T.33).

As no contrary evidence was presented by the Defendant as to the religious purpose and mission of the school, the Court concludes that the religious purpose and mission of Dayton Christian Schools, Inc., is for propagation of the Christian beliefs and faith and that this religious orientation is an integral part of the school's philosophy and operation. The aforesaid religious purposes are shown by the evidence to permeate the school's goals, curriculum and administration.

B. BIBLICAL CHAIN OF COMMAND

The basic religious philosophy of DCS is founded upon beliefs that are reflected in the member's Statement of Faith. (*See,* note 2, *supra*). Almost every aspect of the school's philosophy and approach to education emanate from principles found within the Bible. Of specific relevance to the present proceeding is the belief founded on Matthew 18:15-7

and Galations 6:1 that all those employed or enrolled at DCS always give a good report and adhere to a Biblical Chain of Command.

The Chain of Command refers to a scriptural belief (T.72) in an authority structure. As explained by Claude Schindler in testimony given at trial:

> The principle of giving a good report means that I will not give a bad report about someone else to another party, nor will I listen to a bad report from someone else about that party unless I am being asked, according to Matthew 18, to go as a witness.
>
> In other words, I will not receive a bad report about a teacher from a parent unless that parent has first made contact with the teacher and as a result of that contact is not satisfied, then I will go along with that parent to the teacher to resolve it. If that doesn't resolve it, then the three of us, in turn, will go to our Board of Directors to resolve the conflict. That is what we will call the Chain of Command as specified in Matthew, Chapter 18, Verses 15 through 17 (T.75).

The way the Scriptures teach, the way we are to love God is by our obedience. And we know the Scriptures teach that in obedience, there's [sic] certain authority structures that He has established and we feel that it is important that each teacher recognizes the authorities that have been placed over them as well as we expect the students to recognize the authority the teacher has over them and we expect them to respond to what is placed in front of them in the Teacher's Manual. But if they have a disagreement or do not concur with what is in the policy manual, they have an avenue open to them to come to us and discuss, according to Matthew, Chapter 18: 15-17, and to air their concerns with reference to that particular policy. If they are not satisfied with that, they can—a procedure is established that they

can go to the administrator and ultimately to the Board for resolving that particular conflict. Without that avenue open, we expect them to respond to what we ask them to do (T.52-53).

Consistent with the above explanation is the Constitution of Dayton Christian Schools, Inc., which stipulates that one of the functions of the Board of Directors is to serve as a final Board of Appeals in all misunderstandings involving personnel employed by the Corporation (Exhibit 2, Article V. Section 1E).[3]

In summary, the concept of Chain of Command is closely intertwined with the concept of giving a good report, both of which are scripturally based explanations of an authority structure and, procedurally speaking, are somewhat akin to the legal concept of exhausting administrative remedies.

C. THE DISCHARGE OF MRS. HOSKINSON

The following are the findings of fact concerning the discharge of Mrs. Hoskinson.

(1) In January of 1979, Mrs. Hoskinson informed the principal of DCS, James Rakestraw, that she was pregnant. (Final Petrial Order, Doc. #12, p. 2).

(2) Subsequent to this conversation, Mr. Rakestraw discussed Mrs. Hoskinson's pregnancy with Mr. Claude Schindler who instructed Mr. Rakestraw to write Mrs. Hoskinson a letter stating "that because of our desire to have a mother home with pre-school age children, that she would not be issued a contract for the upcoming school year." (Tr.67) The foundation for this belief was described by Mr. Schindler at trial in the following manner.

[3]*See*, Exhibit 12, Item 19(i) which asks for a similar commitment from each student's parents.

> We believe that the Bible teaches that even though we are equal in the sight of God, our role is different, the role of the female is different than that of the male. The Scripture teaches that in I Peter, Chapter 3, I Timothy Chapter 2, Titus, Chapter 2, just to mention a few passages of the Scripture. And in those passages it spells out the role of a woman. And my counseling with Mr. Rakestraw is based upon those principles in God's Words. And we felt they directly related to a woman being home with her pre-school age children. We rescinded the letter (sent February, 1979 to Linda Hoskinson) because after counseling, we found that we had not adequately explained this to our faculty and to our staff. And thus Mrs. Hoskinson was not fully aware of the convictions of the administration and of the School Board relative to this particular Biblical principle (T.139-140).[4]

Therefore, the record supports the conclusion that, at least in the mind of Mr. Schindler, the nonrenewal of Mrs. Hoskinson's teaching contract was an act consistent with and compelled by religious beliefs.

(3) Pursuant to that discussion, Mrs. Hoskinson received a memorandum from Mr. Rakestraw on or about February 20, 1979, confirming that her teaching contract would not be renewed for the following school year (*Id.;* Exhibit A). The stated reason for nonrenewal was as follows:

> My concern . . . was . . . that as you will be a new parent (June) your teaching next year would be in contrast to the School's philosophy. As a school, we see the importance of the mother in the home during the early years of child growth.

[4]By the provisions of this same contract, violation of any of its provisions by of its either parties entitled the nonbreaching party to void the contract (*Id.* at Item 14; T.84). A further source of authority for dismissal of an employee is found in the Constitution of Dayton Christian Schools, Inc., Article 8, Section 4, which states that "the Board of Directors shall have the right to dismiss any employee . . . whose personal life or instruction conflicts with the basis and purposes of the corporation . . ."

> This is a factor we consider as we interview prospective teachers. If there are pre-school age children in the home we recommend the mother stay there and do not accept her application.

(Exhibit A).

(4) Mrs. Hoskinson was not aware that the school had a policy, whether based on religious precepts or not, concerning pregnancy. Based on the exhibits presented by Plaintiff, it appears that the School's philosophy concerning pregnancy was not anywhere specifically delineated for its employees. Further, Mr. Schindler acknowledged in his testimony that "We had not adequately explained this [philosophy] to our faculty and to our staff. And thus Mrs. Hoskinson was not fully aware of the convictions of the administration and of the School Board relative to this particular Biblical principle." (T.140). Since there was nothing in writing, Mrs. Hoskinson had no way of knowing the policy (T.128), although Mr. Schindler did assert that despite the lack of such documentation, the policy itself had not changed since its inception (T.140).

(5) Having received this notification of nonrenewal, Mr. and Mrs. Hoskinson consulted with an attorney concerning her employment with Dayton Christian Schools, Inc. (Final Pretrial Order, Doc. #12, p. 2) Mrs. Hoskinson's attorney subsequently wrote a letter to the Superintendent of DCS, Mr. Claude Schindler, concerning the February 20th memorandum of Mr. Rakestraw. In this letter, the attorney informed Mr. Schindler that the February 20th memorandum made it apparent that discriminatory practices existed at DCS (Exhibit B). Furthermore, in this letter the attorney informed Mr. Schindler that "[t]o preclude my client from further employment on the basis of pregnancy and child rearing constitutes violations of both state and federal discrimination laws . . . should you not extend further employment to her on the basis of her pregnancy, we will have no alternative but to explore all state and federal administrative and court remedies." (*Id.*).

(6) On or about March 14, 1979, a meeting was held with Mrs. Hoskinson, Mr. Schindler and Mr. Rakestraw, in which Mrs. Hoskinson was informed that she was to be suspended effective immediately because she had gone to an attorney. (Final Pretrial Order, Doc. #12, p. 3; Tr.125 through 126).

(7) Mrs. Hoskinson was aware of the requirement that all teachers follow the Chain of Command prior to consulting her attorney and prior to her discharge.

In Hoskinson's employment contract the inquiry was made: "As a teacher in a Christian School, on what basis would you require obedience of your students?" Her handwritten reply was: "Obedience to those in authority over you is clearly stated in the Bible. I believe in God's Chain of Command." (Exhibit 25, Item 10). Thereafter, Linda Hoskinson entered into a contract with Dayton Christian Schools, and initialed a provision therein which required that she "agree to follow the Biblical pattern of Matthew 18:15-17 and Galatians 6:1 and always give a good report (with) all differences . . . to be resolved by utilizing Biblical principles—always presenting a united front." (Exhibit 22, Item 13). This was the last employment contract signed by Linda Hoskinson (T.65) and was the contract in effect at the time of her discharge.[5]

Linda Hoskinson's own testimony acknowledged her awareness of the Biblical Chain of Command (T.131) and that a passage in the Bible admonishes one Christian not to take another Christian to law. (T.134-135).

Finally, evidence was presented showing that on a prior occasion (April, 1977), Linda Hoskinson failed to adhere to the Chain of Command principal (T.90-91), was warned about this (T.68), faced the possible jeopardy of being discharged at that time (Exhibit 29; T.72, 91-92) but ultimately was rehired (T.94).

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[5]Note that Plaintiffs have included this role differentiation into their new employment contract for teachers. *See* Exhibit 12, Item 13.

(8) On March 15, 1979, Mrs. Hoskinson met with the governing Board of DSC in which meeting her pregnancy was discussed. (Tr.127-129).

(9) On March 26, 1979, the Board met and the decision was made to discharge Linda Hoskinson (she was not present). (Exhibit 33, Page 2).

(10) On March 27, 1979, a correspondence sent to Linda Hoskinson rescinded the memorandum of February 20, 1979, and gave notice of her termination due to serious philosophical differences as evidenced by her violation of Paragraph 13 of her employment contract executed April 17, 1978 (failure to follow the Biblical Chain of Command). (Exhibits D and E). Paragraph 13 provides:

> The Teacher agrees to follow the Biblical pattern of Matthew 18:15-17 and Galations 6:1 and always give a good report. All differences are to be resolved by using Biblical principles—always presenting a united front.

(11) The eventual discharge of Mrs. Hoskinson stemmed from the fact that she contacted an attorney in response to actions taken by the school regarding her employment. As demonstrated by Plaintiffs' testimony and exhibits, this consultation with an attorney constituted a breach of the Chain of Command. The pertinent parts of the record follow:

> Mrs. Hoskinson was terminated because of the violation of I Chronicles, Chapter 6, Versus 1 through 8, and Matthew, Chapter 18, Versus 15 through 17, which is a violation of the Chain of Command in seeking to resolve a conflict outside the church community. (T.68: testimony of Claude Schindler);
>
> The Board . . . has concluded that there is a serious philosophical difference between Linda Hoskinson and Dayton Christian Schools. This has been evidenced by violation of Paragraph 13, contained in her employment contract. (Exhibit 33: minutes of Board meeting; Exhibit D: Termination letter);

> She was discharged because she violated her employment contract, and the time we had a hearing to discuss that she would not talk to the Board with regard to that. (T.147) Specifically, the contract was violated in No. 13, specifically talking about Matthew 18:15-17 and Galatians 6:1, with reference to always giving a good report. (T.148: testimony of Stephen House, School Board Member at DCS);
>
> I was told in the meeting on March 14th at the close of the meeting that I was being suspended because I went to the law, because I talked to a lawyer. (T.124: testimony of Linda Hoskinson).

Thus, the record reveals that the immediate ostensible precipitating cause of Mrs. Hoskinson's discharge was the fact that she went to an attorney to obtain advice and assistance in resisting the decision not to renew her contract because she was pregnant. The Court notes, however, that for the purposes of determining whether the OCRC may exercise jurisdiction over DCS with regard to Mrs. Hoskinson's discharge, it matters not what the *Court* views to be the true or actual reason why Mrs. Hoskinson's teaching contact was terminated. What does matter is the manner in which the *OCRC* views Mrs. Hoskinson's discharge and whether the OCRC may exercise jurisdiction over DCS to investigate her discharge given the religious nature of the school and the asserted religious basis for both the initial decision not to renew her contract and the subsequent decision to terminate her contract for having consulted an attorney.

(12) On March 28, 1979, Mrs. Hoskinson filed a Charge of Discrimination with the Ohio Civil Rights Commission in which she asserted that she believed DCS had discriminated against her on the basis of sex because of the nonrenewal of her teaching contract for the given reason that she was pregnant and because of the subsequent action of the Board

in dismissing her for having consulted an attorney. (Exhibit No. 35).

(13) On April 18, 1979, the OCRC notified counsel for DCS of the charge against the school, suggested that DCS consider "adjustment of the matter," and indicated that a preliminary investigation of the charge had been initiated. (Exhibit No. 36).

(14) On May 14, 1979, the OCRC contacted DCS once again to urge adjustment of the charge and to notify the school that failure to adjust would result in a formal investigation being initiated. (Exhibit No. 37).

(15) On October 29, 1979, the OCRC provided counsel for DCS with written confirmation of the information it would want made available at the investigative conference scheduled to take place at DCS on November 16, 1979. The following information was requested:

1. EEO/OCRC-53 employment data on Respondent for 1977 to the present. A blank OCRC-53 is enclosed for your convenience.

2. Blank employment application form(s) currently used by Respondent.

3. Employee handbooks and rules and regulations for the period January 1, 1977 to the present.

4. Written Respondent policy on the specific factors and procedures involved in the following for the period January 1, 1977 to the present: disciplinary actions, up to and including discharge; employee pregnancies; oral and written performance evaluations; performance standards; employees working with pre-school children; contract renewal; employee grievance procedures; employees resorting to the legal system in grievances with Respondent;

determination of "serious philosophical differences"; inquiries into employees' financial status and baby-sitting plans.

5. Complete job descriptions and model contracts for the teaching position held by Complainant, from January 1, 1977 to the present.

6. A list of all Respondent employees who were pregnant during the period January 1, 1977 to the present, including: name; date of hire; dates of pregnancy; any change in status of employee while pregnant or afterward, including persons recommending change (name, sex, title), reason for change.

7. A list of all employees suspended and/or discharged from January 1, 1977 to the present, including: name; sex; date of hire; position(s) held, with dates; date of suspension/discharge; reason for suspension/discharge; person recommending suspension/discharge (name, sex, title).

8. A written position statement regarding each of Complainant's allegations.

9. Minutes of Respondent's Board of Directors meetings for March 15 and 26, 1979.

10. Complete personnel files for Complainant [and other specified individuals].

Id.

DCS was also advised that the OCRC wanted to interview Mr. Claude Schindler, Jr., Mr. Jim Rakestraw, Mr. Dan Grable, and any other witnesses DCS wished to use to respond to Mrs. Hoskinson's charge. *Id.*

(16) On January 28, 1980, the OCRC informed counsel for DCS that, having completed its preliminary investigation

of Mrs. Hoskinson's charge, the Commission had made the decision that it is probable that DCS or members of its administration had engaged in unlawful discriminatory practices. A proposed Conciliation Agreement and Consent Order aimed at eliminating the unlawful discriminatory practices and obtaining DCS's voluntary compliance with Ohio's civil rights laws was sent to DCS in compliance with Ohio Rev. Code §4112.05(B). DCS was also advised that should conciliation efforts fail, the OCRC would initiate formal proceedings against the school. (Exhibit No. 40).

(17) Subsequent to its initial investigation, the Commission determined, *inter alia*, that:

> Evidence and testimony indicate that but for the fact that Complainant is female and selected to have a child, she would have been offered a teaching contract for the 1979-1980 school year. Evidence and testimony also indicate that Complainant's discharge, and the reasons given for it by Respondent, were directly linked to the February 20, 1979 memo which stated that she would not be offered a contract because "If there are preschool age children in the home we recommend the mother stay there and do not accept her application." Evidence and testimony indicate that Complainant would not have been thus treated had she been a male, and that, therefore, she has been discriminated against because of her sex.

(Exhibit 41).

(18) On February 13, 1980, the OCRC contacted counsel for DCS and advised that DCS had failed to respond with respect to the proffered Conciliation Agreement and Consent Order and had failed to appear at the conference scheduled for information conciliation and that, informal conciliation having failed, the Commission intended to initiate a hearing on the charge before an administrative hearing examiner. (Exhibit No. 42).

(19) The proposed Conciliation Agreement and Consent

Order to which DCS declined to respond or agree would have required DCS to reinstate Mrs. Hoskinson with back pay, and would have prohibited DCS from taking any retaliatory action against Mrs. Hoskinson, or anyone else participating in the proceedings, for having become involved in an action before the Commission. (Exhibit No. 43). The rejected Conciliation Agreement and Consent Order also provided:

> E. Respondent will not discharge Complainant without just cause. Respondent will submit to the North Southwest Regional Office of the Commission, copies of any warnings or reprimands given to Complainant during the next one (1) year, and will also notify said office if Complainant is discharged for any reason within the period of one (1) year.
>
> F. Respondent agrees to implement and administer the policies and work rules of the school equally without regard for the employees' handicap, race, sex, religion, age, color, national origin or ancestry.
>
> G. Respondent shall post in a conspicuous place or places on its premises, the Commission's mandatory notice which sets forth excerpts of Chapter 4112, Ohio Revised Code, and other relevant information.
>
> H. Respondent shall not seek information regarding race, color, religion, age, sex, national origin, handicap or ancestry on its form of application, unless a bona fide occupational qualification is certified in advance by the Commission.
>
> I. Respondent shall make clear in its employment contracts that employees may contact the Commission if they believe they are being discriminated against at any time because of handicap, race, sex, religion, age, color, national origin or ancestry.
>
> J. Respondent agrees to establish specific guidelines for employee pregnancy and home child care, to

notify all employees in writing of this policy, and to furnish the Commission's North Southwest Regional Office, within sixty (60) days from the date of ratification of this agreement, proof of compliance with this provision.

K. Not later than thirty (30) days after the effective date of this conciliation agreement and consent order, an authorized officer of the designated Respondent will furnish the North Southwest Regional Office of the Commission a certified check, made to the order of Complainant, for the full amount of back pay stipulated to in paragraph II(b) supra.

Id. Having rejected the Conciliation Agreement and Consent Order, DCS was not in any way bound by its terms.

(20) On March 9, 1980, the OCRC contacted counsel for DCS and urged that DCS present a counter offer to the proposed Conciliation agreement and Consent Order. (Exhibit No. 44).

(21) On April 18, 1980, the Commission filed a Complaint against DCS to initiate an administrative hearing on the charges filed by Mrs. Hoskinson and the ensuing Commission investigation and determination of probable cause that DCS had been or was presently engaging in unlawful discriminatory practices. (Exhibit No. 45). In particular, the Complaint asserted that it was probable DCS had been or was still in violation of ORC §4112.02(A) (unlawful discrimination on the basis of sex) and (I) (discrimination for having attempted to protect or assert rights under the Ohio Civil Rights Commission Statutes.) The hearing was scheduled to commence on August 7, 1980. *Id.* (The hearing was subsequently postponed and rescheduled to take place on October 8, 1980.)

(22) On May 20, 1980, Plaintiffs filed an answer with the OCRC in response to the OCRC complaint.

(23) On October 1, 1980, Plaintiffs filed the complaints in the instant action.

II. APPLICABLE LAW

In determining whether a permanent injunction should be issued, the Court must first determine whether the Plaintiffs have actually prevailed on the merits of their claim. *Philadelphia Citizens in Action v. Schweiker,* 527 F. Supp. 182, 193 (E.D. Pa. 1981); *Sierra Club v. Alexander*, 484 F. Supp. 455, 471 (M.D. N.Y.), *aff'd*, 633 F. 2d 206 (2d Cir. 1980); *Minnesota Public Interest Research Group v. Butz*, 358 F. Supp. 584 (Minn. 1973). If the Plaintiffs in the present matter have established that the exercise of jurisdiction over DCS by the OCRC to investigate Mrs. Hoskinson's allegations would violate Plaintiffs' first amendment right to freedom of religion, then the Court must determine whether a permanent injunction should be granted to prevent the OCRC from exercising that jurisdiction.

The infringement on Plaintiffs' freedom of religion rights, however, must be more than a mere possibility or speculative. In *Detroit Newspaper Publishers Assn. v. Detroit Typographical Union No. 18*, 471 F. 2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973), the Sixth Circuit quoted Professor Wright in discussing the "ordinary principles of equity" that must be considered prior to issuing a permanent injunction.

> "The classic principles governing availability of injunctions were summarized by Justice Baldwin, sitting at circuit, in 1830; 'There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be

awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act.'

"To this day courts continue to stay their hand until there has been a clear showing of irreparable injury for which there is no other adequate remedy." 3 Barron & Holtzoff, Federal Practice and Procedure (Wright Ed.) §1431.

Id. at 876; *see also, Bradley v. Detroit Board of Education*, 577 F.2d 1032, 1036 (6th Cir. 1978); *Roseboro v. Fayetteville City Board of Education*. 491 F. Supp. 110, 112 (E.D. Tenn. 1977).

If Plaintiffs have demonstrated the requisite real and present danger of irreparable injury, then the Court must weigh the equities between the parties involved to determine how the respective interests of the parties will be affected by the granting or denying of the injunction. *Detroit Newspaper Publishers Assn.*, 471 F.2d at 876; *see also*, 7 *Moore's Federal Practice*, ¶65.18[3], p. 163; Wright & Miller, *Federal Practice and Procedure*, §2942, p. 366-367 (1973). This balancing process involves inquiring into such factors as "the adequacy of another remedy; the benefit to the plaintiff if injunctive relief is granted and hardship if such relief is denied; the hardship on the defendant if injunctive relief is granted; the hardship on third parties; the convenience and effectiveness of administration; and the public and social consequences of either granting or denying injunctive relief." *Philadelphia Citizens in Action*, 527 F. Supp., at 193 (*citing*, 7 *Moore's Federal Practice*, ¶65.18[3], at 65-136 to 65-140.1 (1980).

These factors are not dissimilar to those delineated by

the Sixth Circuit as appropriate for consideration in determining whether a preliminary injunction should be issued. Three of the four factors identified by the court in *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100 (6th Cir. 1982), as appropriate inquiries in preliminary injunction proceedings are equally appropriate in permanent injunction proceedings. Specifically, the Court must consider whether the plaintiff has demonstrated irreparable injury, whether the issuance of the injunction "would cause substantial harm to others," and "whether the public interest would be served by issuing" an injunction. *Id.*, at 102. Equally applicable in permanent injunction proceedings is the court's qualification that the "factors guide the discretion of the district court, they do not establish a rigid and comprehensive test . . . " *Id.*, *see also, Roth v. Bank of Commonwealth*, 583 F.2d 527, 537 (6th Cir. 1978) ("A fixed standard is not the essence of equity jurisprudence . . . ").

The Court, then, must take a careful view of the established facts to ascertain whether and to what extent the Plaintiffs' first amendment right to freedom of religion is in reality threatened by the pending OCRC investigation and hearing. Moreover, if the Court finds that the Plaintiffs' right to freedom of religion is in fact in danger of being impinged upon, the Court must scrutinize and weigh the equities and interests involved to determine the appropriateness of injunctive relief. Finally, if injunctive relief is found to be appropriate, the Court must define with specificity the form and scope of the injunction to be issued. *See, Philadelphia Citizens in Action*, 527 F. Supp. at 193, *citing, Sierra Club v. Alexander*, 484 F. Supp. at 471; *Minnesota Public Interest Research Group v. Butz*, 358 F. Supp. at 584.

III. THE PRELIMINARY INQUIRY: THE POTENTIAL FOR FIRST AMENDMENT PROBLEMS AND THE INTENT OF THE LEGISLATURE.

The Plaintiffs' objections to applying the Ohio Civil Rights Commission statutes (ORC Chapter 4112) to the

employment practices at Dayton Christian School center on what they perceive to be the resultant conflicts with the religion clauses of the first amendment. The Court finds, however, that the very fact that application of the Ohio Civil Rights Commission statutes to DCS *could* give rise to conflicts with Plaintiffs' first amendment rights, requires that the Court perform an initial inquiry prior to addressing any substantive constitutional issues raised by Plaintiffs. This preliminary inquiry begins with an examination of the entire statutory scheme in question to determine whether, and to what extent, application of all of its provisions to the Plaintiffs before the Court would give rise to potential conflicts with the Plaintiffs' constitutional rights. If the potential for such conflicts is serious, the Court must search the available sources reflecting legislative intent to determine if the legislature really intended that the statute in question be applied to Plaintiffs. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-501 (1979). Should it appear that the legislature in fact did not intend that the Plaintiffs be subject to the challenged statutory provision, that is, in the present case, if the Ohio Civil Rights Commission was not intended to have jurisdiction over employers such as DCS, there would be no need for the Court to decide the merits of the first amendment issues raised by Plaintiffs. Instead, the present controversy would be resolved by a determination by this Court that the OCRC could not investigate or conduct a hearing on the charges leveled by Mrs. Hoskinson, not because to do so would run afoul of Plaintiffs' first amendment rights to freedom of religion, but because the state legislature never intended OCRC's jurisdiction to extend so far. The function to be served by this initial inquiry and analysis is to avoid needless determination of constitutional issues if a possible construction of the statute would obviate the apparent conflicts with constitutional rights to which the Plaintiffs object. *Id., EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *Russell v. Belmont College*, 554 F. Supp. 667, 670-71 (M.D. Tenn. 1981).

Therefore, the Court's analysis begins with an examination of the entire statutory scheme embodied in the Ohio Civil Rights provisions to determine whether the application of this statutory scheme to DCS would "give rise to serious constitutional questions." *NLRB v. Catholic Bishop*, 440 U.S. at 501. In this analysis, the Court focuses on the nature of the institution (Dayton Christian Schools) and the potential activity envisioned under the statute with respect to that institution. *NLRB v. Catholic*, 440 U.S. at 501-504; *EEOC v. Southwestern Seminary, 651 F.2d at 285; EEOC v. Pacific Press Publishing Assn.*, 676 F. 2d 1272, 1276-1277 (9th Cir. 1982). *Ritter v. Mount St. Mary's College*, 495 F. Supp. 724, at 726-729 (Md. 1980). Should potential constitutional problems appear likely to arise from application of the OCRC provisions to DCS, then the Court must, as noted above, take a second look to evaluate whether the legislature "clearly expressed an affirmative intention" that the statute grant the OCRC jurisdiction over employers such as DCS, *NLRB v. Catholic Bishop*, 440 U.S. at 500 *(quoting, McCulloch v. Sociedad Nacional de Marineros de Hondura*s, 372 U.S. 10, 21-22 (1963); *and, Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)).

In undertaking this preliminary examination, the pervasively religious environment of DCS must be kept in mind. Every aspect of the school's operation is geared toward exposing and educating the students on how to lead a Christian life by understanding what the members consider to be the guidance and direction provided by the Bible. As revealed in the testimony at the hearing on this matter and in the exhibits accepted into evidence, the teachers at DCS are selected because of their ability to blend their avowed religious beliefs into every lesson and school activity. Teachers are required to be born again Christians and to carry with them into their classes the religious fervor and conviction felt necessary to stimulate young minds into accepting Christ as savior. Because of the emphasis placed on the religious education of the students, the school demands that teachers conform both in thought and conduct to the tenets and principles felt essential to leading a Christian life. The belief system espoused by the members of DCS

touches every aspect of their life: work, interpersonal relationships, family and recreational activities. Deviation in any way from what is felt to be the proper religious way of life may cast doubt on a teacher's ability to perform his or her critical role and may, therefore, be grounds for dismissal. The powers extended to OCRC under Ohio Rev. Code Chapter 4112: Civil Rights Commission, must be reviewed against this backdrop.

Ohio Rev. Code Chapter 4112 is Ohio's counterpart to 42 U.S.C. §2000e, et seq., or Title VII, which extends jurisdiction to the federal agency, the Equal Employment Opportunity Commission (EEOC), to eliminate various forms of discriminatory employment practices. Under Title VII, discrimination in an employment setting on the basis of an "individual's race, color, religion, sex, or national origin" is an unlawful employment practice (42 U.S.C. §2000e-2) which the EEOC is authorized to prevent through the statutorily defined enforcement procedure in 42 U.S. C. §2000e-5.

Specifically exempted from application of Title VII are religious "corporation[s], association[s], educational institution[s], or societ[ies] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. §2000e-1. This exemption has consistently been construed as permitting a religious employer to discriminate on the basis of religion with respect to employees who are to carry out the religiously oriented work of the employer. *See, e.g., Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477, *cert. denied*, 101 S. Ct. 3143 (1981) (5th Cir. 1980); *Ritter*, 495 F. Supp. 724.

The statutory scheme of Title VII envisions, and makes allowances for, the states to enact their own statutes, aimed at eradicating discriminatory employment practices. If a state has a law prohibiting an alleged unlawful employment practice and an agency authorized to grant or seek relief from such practice, then the complaint must first commence state resolution of the dispute prior to resort to the federal system.

See, 42 U.S.C. §2000e-5(c)&(d). Thus, a dual or parallel state and federal scheme for eliminating discriminatory employment practices is permissible under the federal provisions. Furthermore, a state statutory scheme need not mirror in every respect the prohibitions of the federal statutes. State laws are not preempted by the federal statutes except to the extent such laws are inconsistent with the purpose of the federal statutes, or "purport to require or permit the doing of any act which would be an unlawful employment practice under this statute." 42 U.S.C. §2000e-7; *see also, Shehadeh v. Chesapeake and Potomac Telephone Co.*, 595 F. 2d 711 (D.C. Cir. 1978); *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971), *reversed on other grounds*, 474 F.2d 949 (6th Cir. 1972).

Ohio Rev. Code Chapter 4112, though similar in many respects to its federal counterpart, appears to some degree to adopt an even broader prohibition against discriminatory practices. For example, Ohio Rev. Code §4112.02(A) makes it unlawful for any employer to "discharge without just cause, to refuse to hire, or otherwise to discriminate against [a] person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment" on the basis of "race, color, religion, sex, national origin, handicap, age or ancestry."

Additional prohibitions are contained in §4112.02(E):

It shall be an unlawful discriminatory practice.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, or labor organization, prior to employment or admission to membership to:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, handicap, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, handicap, age or ancestry of any applicant for employment or membership.

(3) Use any form of application for employment, or personnel or membership blank seeking to elicit information regarding race, color, religion, sex, national origin, handicap, age, or ancestry . . . ;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, handicap, age, or ancestry;

(5) Announce or follow a policy of denying, or limiting through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, handicap, age, or ancestry of such group;

(6) Utilize in the recruitment or hiring of persons any employment agency, placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, handicap, age, or ancestry.

Ohio Rev. Code §4112.02(E).

Ohio Rev. Code §4112.99 would make violation of these provisions a misdemeanor of the third degree.

Applying the above cited statutory prohibitions to DCS, the Court finds that those provisions would appear to make it an unlawful discriminatory employment practice for DCS to make a decision to employ a "Born Again" Christian as

opposed to someone, for example, adhering to Catholic or Jewish beliefs, assuming such individuals shared equal teaching abilities. Furthermore, the statute would appear to require DCS to get advance approval from the Commission that religion was a "bona fide occupational qualification" before they could question job applicants about their religious beliefs, keep records concerning applicants' religious beliefs, use forms eliciting information about religious beliefs, advertise for teachers holding particular religious beliefs, adopt a policy of hiring only adherents to fundamentalist principles, or accept applicants through any religiously oriented body that recommended only those holding fundamentalist beliefs.

A review of the record in this case makes it clear that if these statutory prohibitions were brought to bear on DCS, the school could be found to be violating each and every limitation. Arguably, they could escape liability under §4112.02(E) by obtaining approval from the commission that religion is a bona fide occupational qualification.[8] There is no reason to believe that the Commission would be hesitant in granting certification to schools such as DCS, the fact remains that rather than being able to engage in employment practices that have almost never been seriously questioned, religiously oriented schools such as DCS must now apparently seek approval from the state before they can actively

[8]Even if DCS were to obtain from the OCRC certification that religion was a bona fide occupational qualification for purposes of subsection (E) cited above, it is not all clear that such certification would likewise relieve DCS from the apparent unconditional prohibition contained in subsection (A) against discriminating on the basis of religion in the hiring and firing of employees.

seek out teachers who are adherents to their religious beliefs.[7]

The Supreme Court has long recognized the highly sectarian role of the teacher in religiously oriented schools. *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971); *NLRB v. Catholic Biship*, 440 U.S. at 501; *Meek v. Pittinger*, 421 U.S. 349, 370 (1975). The teacher's critical role in propagating the fundamentalist religious tenets at DCS makes it clear that any attempt by the state to limit the ability of DCS to probe into job applicants' religious beliefs or to hire on the basis of religion could result in an impermissible interference of the state into the religious practices of the DCS's administration, its teachers, and its pupils and their parents. That DCS may have to seek certification that religion is a bona fide occupational qualification would cast the Commission into the role of deciding whether religious conviction truly is important in any or all positions at the school. The Commission might willingly and without questions extend certifications to schools such as DCS and may choose not to consider complaints that such schools discriminated on the basis of religion, but herein the Court must look for all the risks of first

[7]A curious aspect of this statute, which also prohibits discrimination in matters relating to housing under §4112.02(H), is that §4112.02(K) provides that:

> (K) Nothing in division (H) of this section shall bar any religious or denomination institution or organization, or any charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, or any bona fide private or fraternal organization, from giving preference to persons of the same religion or denomination, or to members of such private or fraternal organization, to promote the religious principles or the aims, purposes, or fraternal principles for which it is established or maintained.
>
> Apparently, the legislature felt that religious institutions could discriminate in favor of their adherents in housing matters but were unwilling to extend this exemption to employment situations. Only the most tortured reading of subsection (K) would allow the Court to apply this exemption to employment situations too. Such a reading would necessitate the court either reading the reference to "division (H)" entirely out of the subsection, or reading "and division A&E" into the statute. The court refrains from exercising such editorial license in light of the apparent legislative intent to have the exemption limited to housing matters only.

amendment infringement that *could* occur if the Commission's jurisdiction as described in the statute extended to DCS. *NLRB v. Catholic Bishop*, 440 U.S., *supra*, at 502.

With respect to DCS, though perhaps not with all religiously oriented schools, §4112.02(I) also poses a risk of infringing on the members' first amendment rights. This subsection makes it unlawful:

> (I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful practice defined in this section, or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

Ohio Rev. Code §4112.02(I). The conflict herein results from the religious tenets of the fundamentalists that one must follow the chain of command and never make a bad report. These religious tenets, as described above, founded upon Biblical passages, prohibit one from taking a dispute outside the school's hierarchy. To file a complaint with the OCRC would be seen as a departure from this religious tenets and grounds for dismissal. Section (I), however, would make enforcing this religious tenet an impermissible retaliatory action. This conflict in fact is part of the present controversy. To enforce this provision against DCS could be viewed as resulting in the state depriving the members of the their ability to act in accordance with their beliefs by punishing, dismissing or otherwise discriminating against a member who violates this tenet.

Putting aside the troublesome facial prohibition on discriminating on the basis of religion, the prohibitions on the other forms of discrimination could, as applied to DCS, create problems. The controversy presented here bears evidence of the type of conflicts that can arise. Again, what must be kept in mind is the extensive all-encompassing nature of the

religious doctrines that guide the activities at DCS. Failure to demonstrate the requisite attitude and temperament can be grounds for a teacher's dismissal. Inherent in such decisions are very subjective sectarian evaluations. Should an individual, however, charge that the religious reasons given for dismissal were but a pretext for sex, race, or some other form of unlawful discrimination, then the Commission would have to evaluate the subjective sectarian decision to determine if it was properly made or if the real reason for dismissal was some form of prohibited discrimination.

Added to this is the further complexity, also presented in this controversy, of religious tenets which, if enforced, could be construed as being a form of impermissible discrimination by DCS. The focus on the home and family of the fundamentalists, for example, leads to the conviction in some that the mother should be home when the children are young. Yet to terminate a female teacher's contract because she is pregnant is a form of sex discrimination according to Ohio Rev. Code §4112.01(B). Once again, the Commission could be cast in the role of dictating to the school administration which of its beliefs its members may enforce and, in the alternative, which doctrinal violations they must tolerate and live with.

The potential for intrusion into the administration and operation of DCS is accentuated when the provisions describing the Commission's powers and duties are reviewed. Ohio Rev. Code §4112.04 provides:

> (B) The commission may:
>
> (2) Initiate and undertake on its own motion investigations of problems of employment discrimination;
>
> (3) Hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and require the production for examination of any books and papers relating to any matter under investigation or in

> question before the commission, and may make rules as to the issuance of subpoenas by individual commissioners.
>
> (a) In conducting a hearing or investigation, the commission shall have access at all reasonable times to premises, records, documents, individuals, and other evidence or possible sources of evidence and may examine, record, and copy such materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation. In such investigations, the commission shall comply with the fourth amendment to the United States Constitution relating to unreasonable searches and seizures. The commission or a commissioner may issue subpoenas to compel access to or the production of such materials, or the appearance of such persons, and may issue interrogatories to a respondent, to the same extent and subject to the same limitations as would apply if the subpoenas or interrogatories were issued or served in aid of a civil action in a common pleas court. No person shall be compelled to be a witness against himself.

The above provisions would permit the Commission to inject itself into the affairs of DCS either on the basis of a complaint filed or on its own motion. Furthermore, §4112.05 provides the commission can conduct investigations and hearings and

> issue and . . . cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of sections 4112.01 to 4112.08 of the Revised Code, including, but not limited to, hiring, reinstatement, or upgrading of employees with, or without, back pay, admission or restoration to union membership,

including a requirement for reports of the manner of compliance.

Ohio Rev. Code §4112.05(G).

Within this procedural framework exists the potential for the Commission to evaluate sectarian decisions, in the context of hearings and investigations, to prohibit adherence to, or at least actions based upon religious tenets, and, in fact, to require the posting of anti-discrimination statements that may run contrary to the members' religious beliefs. In a school which attempts to permeate every lesson and activity with its religious principles and values, such potential intrusion by the state squarely presents a risk of impermissible state entanglement and interference with the members' religious beliefs and practices.

Whether all of the potential infringements on First Amendment rights occur will depend in part upon how the Commission decides to apply the Civil Rights Commission statutes to schools such as DCS. Not knowing whether or how the Commission may act in the future, the Court can only examine the potential risks and conclude that the application of the Ohio Civil Rights Commission statutes to DCS could, in some instances, raise concerns closely akin to those raised by the Supreme Court, in examining the potential for first amendment infringement should the National Labor Relations Board (NLRB) have jurisdiction to investigate charges of unfair labor practices in parochial schools. There, as herein, "[t]he resolution . . . charges . . . , in many instances, will necessarily involve inquiry into the good faith position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the religion clauses, but also the very process of inquiry leading to findings and conclusion." *NLRB v. Catholic Bishop*, 440 U.S. at 502.

The Supreme Court has stated that governmentally

established religion or governmental interference with religion will not be tolerated. *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970). In determining whether a particular government action would run afoul of the First Amendment:

> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or *interfere with religious beliefs and practices or have the effect of doing so.* Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.

Walz, supra, at 669 (emphasis added).

It was this concern for potential government interference with religion, resulting from the state's evaluation of the reasons for discharge of teachers in a fundamentalist school, that prompted a California District Court to find the California Unemployment Insurance Code unconstitutional as applied to church schools such as DCS. *Grace Brethren Church v. California*, No. CV-79-93 MRP, April 6, 1981 (C.D. Calif.). The potential for state interference with religion as practiced at DCS are no less grave in the instant case and, thus, the Court must take a second look at the statute in question to determine if the legislature "clearly expressed an affirmative intent" that the statute grant OCRC jursidiction over employers such as DCS. *NLRB v. Catholic Bishop*, 440 U.S. at 501.

Unaided by state legislative history to reveal intent, the Court must rely on the language of the statute in an effort to discern whether the Ohio legislature intended Ohio Rev. Code Chapter 4112 to apply to DCS and similar religiously oriented schools. Ohio Rev. Code §4112.01(A)(2) defines "employer" to include "the state, or any political subdivision thereof, any person employing four or more persons within

the state, and any person acting in the interest of an employer, directly or indirectly." Subsection (A)(1) defines "person" as follows:

> (1) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. It also includes but is not limited to any owner, lessor, assignor, builder, manager, broker, salesman, agent, employee, lending institution, and the state and all political subdivisions, authorities, agencies, boards, and commissions thereof.

Dayton Christian Schools is a non-profit corporation,[8] and if its non-profit status can in any way be seen as distinguishing it from the category of "corporation" in the above provision, then it certainly can still be encompassed in the category of "other organized groups of persons." That the statute was intended to extend to employers such as DCS becomes clearer by the fact that the legislature inserted an exemption for "religious and denominational institutions" from the prohibitions on discrimination in housing. Ohio Rev. Code §4112.02(K). Were the prohibitions of Section 4112.02 not deemed to extend to religious institutions such as Dayton Christian Schools, there would, of course, have been no need to make such an exception within the housing provisions of that statutory section.

"Employee" is also broadly defined in §4112.01(A)(3) as "an individual employed by any employer but does not include any individual employed in domestic service of any person." Nothing in this definition even hints that teachers in parochial schools are not within the ambit of the statute. The

[8] *See*, "Findings of Fact, *supra*.

statute aims broadly by prohibiting "any employer" from engaging in unlawful discriminatory conduct. Ohio Rev. Code §4112.02(A). Having demonstrated its ability to create an exception for religious institutions in housing matters in §4112.02(K), the legislature must be deemed to have clearly intended that there be no exceptions from its outright prohibition against any employer's engaging in discriminatory conduct.

Inferring the intent of the Ohio legislature with respect to the breadth of the application of Chapter 4112 solely from the language and structure of the statute may appear to provide a basis for discerning legislative intent that falls somewhat short of the "clearly expressed [ ] affirmative intent" standard as discussed in *NLRB v. Catholic Bishop, supra*. Nonetheless, in the present matter, the Court notes that however grave may be the potential for infringement on first amendment rights, the level of potential entanglement is still substantially less than was presented to the Supreme Court in *Catholic Bishop*. Therein the NLRB would not only have had jurisdiction to hear and to decide charges of unfair labor practices, but would also have been deciding the terms and conditions of employment and therefore what matters would be mandatory subjects of collective bargaining. The Supreme Court noted that almost all of the activities in a school setting could be construed as conditions of employment and that requiring collective bargaining on such matters severely encroached on the sectarian administration of the school. *NLRB v. Catholic Bishop,* 440 U.S. at 5002-504. Though the level of potential interferences with religious matters is grave under Ohio Rev. Code Chapter 4112, it does not present the clear possibility of ongoing and intensive oversight that was threatened in *Catholic Bishop*. Therefore, the Court feels that this lesser showing of affirmative legislative intent is sufficient to support the conclusion that the legislature intended the jurisdiction of OCRC to extend to religious schools such as DCS. Because the Court concludes that the Ohio legislature intended ORC Chapter 4112 to vest the Ohio Civil Rights Commission with jurisdiction over schools such as DCS, the

Court must determine whether, notwithstanding this apparent grant of authority to the OCRC, the extension of jurisdiction over DCS to investigate and conduct a hearing on a charge of sex discrimination and retaliatory firing impermissibly infringes on the Plaintiffs' asserted first amendment rights to freedom of religion. Prior to reaching the merits of Plaintiffs' freedom of religion claims, however, the Court will first address Plaintiffs' overbreadth and void for vagueness attacks on Chapter 4112.

IV. OVERBREADTH

Plaintiffs make a number of constitutional challenges to this statute, including the assertion that it "is a law void on its face for overbreadth." Pointing to the provisions that seemingly prohibit religious employers from discriminating on the basis of religion, Plaintiffs allege that the statute sweeps too broadly in achieving its goal of ending discrimination and in so doing infringes impermissibly on first amendment rights. In addition to all of the potential risks of infringements discussed in Section III of this opinion, Plaintiffs also feel that §4112.02(E) would prohibit not only an employer, but also a church from seeking religious information from an applicant for membership or from evangelizing or proselytizing by publishing, unless it received prior certification from the Commission. Plaintiffs arrive at this broad interpretation of the statute relying on the following language:

> It shall be an unlawful discriminatory practice:
>
> (E) Except where based on a bona fide occupational qualification certified in advance by the commision, for any *employer,* employment agency, or labor organization, *prior to employment or admission to membership,* to . . . [a list of prohibited discriminatory conduct follows].

Ohio Rev. Code §4112.02(E) (emphasis added).

Plaintiffs assert that this provision makes the prohibitions within that statutory section applicable to employment *and* memberships and since religious organizations can have both employees and members, they are prohibited from seeking, using, relying upon religious criteria when they are soliciting either employees or members.

The standard to apply in determining if a statute sweeps too broadly and infringes impermissibly on constitutionally protected rights is "whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). The consequence of finding a statute either overbroad or vague are severe. "A declaratory judgment of a lower federal court that a state statute is invalid *in toto*—and therefore incapable of any valid application—or is overbroad or vague—and therefore no person can properly be convicted under the statute until it is given a narrowing or clarifying construction, will likely have a more significant potential for disruption of state enforcement policies than a declaration specifying a limited number of impermissible applications of the statute." *Steffel v. Thomas*, 415 U.S. 452, 474 (1973) (citations omitted). A claim of overbreadth necessitates that the Court determine whether the state, in attempting to regulate conduct admittedly within its power to regulate, has drafted the statute so that it necessarily impinges on constitutionally protected conduct. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958); *American Communications Assn. v. Douds*, 339 U.S. 382 (1950).

Turning to the statute at issue here, the Court cannot agree that it is unconstitutionally overbroad. At the outset, the Court rejects Plaintiffs' interpretation that Ohio Revised Code §4112.02(E) extends, or was even intended to extend, to the church-member relationship. The only logical interpretation to give this statutory provision is that the employer is prohibited from engaging in the proscribed conduct prior to extending employment to an individual, and a labor organization is likewise prohibited from engaging in the proscribed

conduct prior to granting membership to an individual. As employers are generally not thought of as granting "admission to membership[s]," phrase can only be viewed as referring to the activities of labor organizations that typically do admit members.

Nonetheless, the Court has already noted a number of potential first amendment conflicts that could arise from application of the statute. The question is whether these potential infringements add up to a "substantial amount of constitutionally protected conduct." The statute has the perfectly acceptable objective of eliminating discrimination in employment and housing settings. Though there may be a number of religious employers in the state, most employers are not tied to or involved with sectarian work. Even considering only religious employers, it cannot be said that the statute's apparent prohibition on discriminating on the basis of religion automatically leads to an infringement of religious employers' freedom to exercise their religion. To the extent that religious employers engage in more secular businesses, it becomes increasingly difficult to see how prohibiting them from engaging in religious discrimination could in any way interfere with their religious beliefs. Furthermore, it is not at all clear at this time whether the OCRC will even construe the prohibition against religious discrimination as being applicable to religious employers who are hiring employees to carry out activities related to their religious purposes. Admittedly, the absence of an exemption, such as that in Title VII, for religious employers creates a *risk* of interference with the religious freedoms of some employers, but the risk is not so substantial, especially in view of all the myriad of legitimate applications of the statutes, to justify striking the statute down *in toto*.

Nor does the size of the risk increase substantially because religious employers are also prohibited from discriminating on the other bases cited in the statute. That a limited number of religious orders may mandate discrimination against one or more of the subgroups protected in the

statute does not merit a finding that the statute poses a substantial threat to the free exercise of religion in the State of Ohio. Moreover, in view of the recent Supreme Court holding in *Bob Jones University v. United States* and *Goldsboro Christian Schools, Inc. v. United States*, 103 S. Ct. 2017 (1983), it is clear that notwithstanding religious tenets underlying racial discrimination, a ban on such discrimination, as contained in the statute at issue herein, would prevail because of what has been determined to be the government's overriding and compelling state interest in eliminating race discrimination in schools.

Because the Court concludes that Chapter 4112 does not necessarily impinge on a substantial amount of constitutionally protected conduct, the Court declines to find the statutory provisons unconstitutional on the grounds of overbreadth.

V. VOID FOR VAGUENESS

Plaintiffs argue that the statute is void for vagueness. Specifically, Plaintiffs find that the language in 4112(A) which makes it unlawful to "discriminate . . . with respect to any matter . . . indirectly related to employment" is subject to such wide interpretation that the school's administration will be unable to predict whether their conduct falls within the proscription.

As stated above, finding a statute void because it is either overbroad or vague leads to the harsh result of making the statute unenforceable against anyone until it has been given a clarifying construction. *Steffel*, 415 U.S. at 474. The test to be applied in reviewing a statute is whether it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application." *Zwickler v. Koota*, 389 U.S. 241, 249 (1967), *citing, Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Applying this standard to the statute in question, the Court finds that the statute is not void for vagueness. The pivotal phase in the statute, that is, the conduct which the statute proscribes, is "to discriminate." In view of the mass of publicity that various forms of discrimination have received over time, it seems clear that a person of common intelligence would be able to understand the conduct at which the statute aims. Quite simply, the statute prohibits an employer from treating one differently without just cause because of that person's age, sex, race, national origin, handicap, religion, or ancestry. The statute lists the following practices as unlawful: "to discharge without just cause, to refuse to hire, or otherwise discriminate . . . with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Ohio Rev. Code §4112.02(A). This provision is not rendered unconstitutionally vague merely because its area of proscription extends to matters "indirectly related to employment." The legislature sought to remove all vestiges of discrimination from the employment setting and employer-employee relationship. The final catchall phrase could well have been deemed necessary to avoid the possibility of the statute being read narrrowly and giving rise, for example, to arguments that the benefit being denied was not really related to employment or the job itself and was therefore outside the scope of the statute. If the employer acts even-handedly in all matters relating to employment, the likelihood of unwittingly running afoul of this provision should be minimal.

To the extent the state's proscription against discrimination is not clearly defined, the Court recognizes that it would be impossible to list or describe all the methods or means by which employers may treat individuals or classes differently because they possess one or more of the listed traits. We are, in fact, still learning the varied and subtle ways that we have used stereotypical criteria or relied upon class generalizations as a basis for determining how we treat or relate to particular individuals. Having made a national commitment, however, to afford each individual an equal opportunity in

life, we must live with any vagueness that may be inherent in the word discrimination. In view of the overriding specificity of the conduct proscribed by ORC §4112.02(A), the Court cannot conclude that any ambiguity inherent in the phrase "related to employment" is sufficient to render the statute "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Zwichler*, 389 U.S. at 249. The Court, therefore, declines to find the statute unconstitutional on the basis that the statutory proscription is void for vagueness.

VI. FREE EXERCISE CLAUSE

Plaintiffs contend that the application of Ohio Rev. Code Chapter 4112 to them interferes with their first amendment right to free exercise of religion. In support of this contention, the Plaintiffs emphasize the pervasively religious environment of DCS. The parents of the students, it is urged, send their children to DCS for religious reasons. The school is a means through which they propagate their religious beliefs and any attempt by the state to interfere with the decisions that are made within the school is an impermissible interference with the administration of a religious body. Furthermore, Plaintiffs contend, the decision to terminate Mrs. Hoskinson was based on her violation of the religious belief that one must follow the Biblical Chain of Command and may not make a bad report. By consulting an attorney because her teaching contract had not been renewed, she acted contrary to this religious tenet. Similarly, Plaintiffs urge that to the extent the Court considers the decision to terminate as being based upon the fact she was pregnant, this decision was also founded on religious tenets. As both decisions were based on religious beliefs, Plaintiffs assert that allowing the state to interfere with these decisions would violate their free exercise right.

Defendants assert that no first amendment problem is

raised in the present case because neither DCS, Mr. Schindler, nor Mr. Rakestraw had a religious tenet concerning pregnancy which, Defendants argue, was the true reason Mrs. Hoskinson was fired. The decision to terminate, according to Defendants, stemmed from the personal philosophy of Mr. Schindler and not from any religious convictions. Furthermore, dismissing Mrs. Hoskinson for failing to follow the chain of command was, according to Defendants, a mere pretext. Had the school not discriminated against Mrs. Hoskinson because she was pregnant, she never would have sought legal counsel. Applying a "but for" analysis to the chain of events, Defendants find the two decisions so inextricably interwined that it can only be concluded that her pregnancy was the sole reason for dismissal.

To the extent the Court finds that the facts in this case present a free exercise of religion problem, Defendants assert that the state has an overriding interest in eliminating invidious discrimination which justifies whatever slight infringement on Plaintiffs' exercise of religion may be found to be imminent. In addition, Defendants emphasize that the Supreme Court has long recognized and protected the freedom of making personal choices in matters concernings marriage and the family. Defendants argue that such privileges, which, according to Defendants, include decisions such as Mrs. Hoskinson's to have a child, should not be denied persons simply because they choose to work in a parochial school.

Before undertaking the analysis of the free exercise claim, the Court feels it necessary to clarify what is disputed in the present matter. Plaintiffs make much of all of the possible ways the statute could be applied to them that would, to varying degrees, interfere with their right to exercise religion. As discussed in Section III of this opinion, the Court recognizes that the statute *could* be applied in any number of ways that could impermissibly interfere with Plaintiffs' free exercise rights.

However, the majority of concerns raised by the Plaintiffs are at this state hypothetical or speculative, and the threat of enforcement of all of the potentially troublesome provisions discussed by the Court in Section III lack the "sufficient immediacy and reality" to make them part of the actual justiciable controversy presently before the Court. *See, Blum v. Yaretsky*, 102 S.Ct. 2777, 2779 (1982). *O'Shea v. Littleton*, 414 U.S. 488, 496-498 (1974); *EEOC v. Mississippi College*, 626 F.2d at 487. Similarly, the defendant-college in *EEOC v. Mississippi College*, speculated over the possible manner in which the EEOC could exercise its jurisdiction over the College in such a way that *could* run afoul of the proscriptions in the Religion Clauses of the Constitution. The Fifth Circuit, however, declined to base its ruling on the constitutionality of the EEOC's exercise of jurisdiction on more than the *actual* conduct threatened by the facts presented. *EEOC v. Mississippi College*, 626 F.2d at 487.

Though there may be any number of ways Chapter 4112 could be construed and applied to DCS which could run afoul of the first amendment rights of Plaintiffs, the Commission has not at this juncture attempted to initiate action under all of these potentially troublesome enforcement provisions. Review of the precedents fails to reveal a single instance where the Supreme Court has engaged in speculation over the *possible* applications of a statute in determining whether it impermissibly infringes on first amendment rights. Rather, the Court has only dealt with the constitutional issue when presented with a justiciable controversy involving injury in fact or threatened injury of "sufficient immediacy and reality." *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Braumfeld v. Brown*, 366 U.S. 599 (1961); *Follett v. McCormick*, 321 U.S. 565 (1944); *Prince v. Massachusetts*, 321 U.S. 158 (1944). *See also, United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947) ("The power of courts and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of the litigants require the use of this judicial authority for their

protection against actual interference. A hypothetical threat is not enough.")

The only conduct on the part of the Commission that is presently being threatened with sufficient immediacy and reality to present a justiciable controversy is the investigation, which has already taken place, and the pending hearing on the complaint filed by the OCRC concerning the discharge of Mrs. Hoskinson. The issue, then, that is presently before the Court is whether the OCRC may exercise jurisdiction over DCS to investigate and to conduct a hearing to determine if Mrs. Hoskinson was dismissed for the alleged unlawful discriminatory reason that she was pregnant and/or as a result of having attempted to enforce her rights under the OCRC statutes, or whether, in the alternative, the exercise of jurisdiction by OCRC to investigate and to decide this matter would result in an impermissible infringement on Plaintiff's first amendment rights to free exercise of religion.

At the outset, the Court notes that there is nothing about the nature of DCS which would automaticaly exempt it from the coverage of Chapter 4112. That is, DCS is not a church, nor is the relationship between the teachers and the administration DCS a church-minister relationship. Thus, matters concerning employment at DCS are not "matters of church administration and government and thus purely of ecclesiastical cognizance." *McClure v. Salvation Army*, 460 F. 2d 553, 559-60 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). Were decisions with respect to the teachers at DCS properly viewed as ecclesiastical matters, clearly the OCRC could not intervene or attempt to bring the proscriptions of Chapter 4112 to bear upon the institution. *Watson v. Jones*, 80 U.S. 679, 727 (1871); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). *Serbian East Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). *See also, EEOC v. Mississippi College*, 626 F.2d at 485;

McClure v. Salvation Army, 460 F.2d at 560. However religiously oriented may be its educational program, DCS is, as its title bespeaks, a school. The relationship between the administration and the teachers is an employer-employee relationship that courts, when considering similar institutions, have found to subject to the comparable anti-discrimination proscriptions of Title VII. *EEOC v. Mississippi College*, 626 F.2d at 485; *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d at 281. *See also, EEOC v. Pacific Press Publishing Association*, 675 F.2d at 1277. As noted above in Section III, the structure and wording of ORC Chapter 4112 reflect the intent of the Ohio legislature to reach the employment relationship between DCS and its staff and the Court does not find the nature of the institution to be such that this intent of the legislature must be overriden by affording DCS with a blanket exemption from application of Chapter 4112.

As the nature of the institution does not afford a blanket exemption to DCS, then it must be determined whether there is something about the nature and extent of the threatened state action which in this instance impermissibly impinges on Plantiffs' free exercise rights. In other words, if the OCRC is to be permitted to extend jurisdiction over DCS with respect to Mrs. Hoskinson's discharge, it may do so either because it would not infringe on Plaintiff's constitutional right of free exercise of their religion, or "because any incidental burden on the free exercise of [their] religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . '" *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), *citing, N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). Three factors are considered to determine if a statute, neutral on its face, violates the free exercise clause:

1. the magnitude of the statute's impact upon the exercise of the religious belief,

2. the existence of a compelling state interest justifying the burden imposed upon the religious belief, and

3. the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.

EEOC v. Pacific Press, 676 F.2d 1272, 1279 (9th Cir. 1982), *citing*, *EEOC v. Mississippi College*, 626 F. 2d at 488, *citing*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 198.

The first question that must be addressed is whether the OCRC's exercise of jurisdiction in this matter will burden Plaintiff's free exercise of religion. *United States v. Lee*, 455 U.S. 252-257 (1982); *Wisconsin v. Yoder*, 406 U.S. at 215, 216; Sherbert v. Verner, 374 U.S. at 403. "Only beliefs rooted in religion are protected by the Free Exercise Clause." *Thomas v. Review Board*, 450 U.S. at 713. "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . .. However, the resolution of that question is not to turn upon judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection." *Id.* at 714.

The OCRC seeks to review two actions that were taken with respect to Mrs. Hoskinson by the school and its administrators. The first action was that taken by the principal, Mr. Rakestraw, at the behest of Mr. Shindler, the superintendent, when he declined to renew Mrs. Hoskinson's teaching contract because she was pregnant. The second act sought to be reviewed was that of the DCS Board when it terminated Mrs. Hoskinson's contract for the articulated reason that a "serious philosophical different" existed between the Hoskinsons and DCS as evidenced by Mrs. Hoskinson's failure to follow the Biblical Chain of Command in violation of her employment contract. (Plaintiffs' Trial Exhibit #33, March 26, 1979, Board Resolution.)

The decisions made by the two school administrators was described in the notice sent by Mr. Rakestraw as being

based on his philosophy that a mother should be at home with her children. (Defendant's Exhibit A, Feb. 20, 1979, Inter-Office Memo to Linda Hoskinson from Jim Rakestraw). In the subsequent letter from Mr. Schindler rescinding the memorandum in which Mrs. Hoskinson's contract was not renewed, Mr. Schindler indicated that

> Dayton Christian Schools, Inc., has not changed its policy concerning the need for pre-school children to be in the home and to receive direct love and guidance from Christian parents. However, we have concluded that this is an area that has not been carefully studied and documented. It is our intention to diligently and prayerfully search the Scriptures for guidance in this area. After this has been accomplished, we will be better prepared to formulate school policy in this area.

(Defendants' Exhibit C, March 27, 1979, letter from Mr. Schindler to Linda Hoskinson). Mr. Schindler also testified that he felt that specific passages from the Bible mandated such a view or philosophy. This belief, however, was not reflected in any of the school's writing, such as the schools' constitution, the teacher's manual, or the teacher's contract.

Defendants urge that the evidence establishes that the decision not to renew Mrs. Hoskinson's contract resulted from a personal philosophy of the administrators and not from religious beliefs. In support of this interpretation, Defendants cite *Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980), and *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977). Both of these opinions provide support for the idea that the Court should focus on defining what constitute the religious beliefs and practices of the institution. Under this line of reasoning, it would appear that only those practices based upon articulated, agreed upon, and well established religious beliefs of the institution should receive first amendment protection. Conduct not based on institutional religious beliefs may be classified as

resulting from personal philosophy or policy and not deserving of First Amendment protection.

The Court, however, finds this analytical approach deficient in that it fails to recognize or accord due regard for the free exercise rights of the individual members of an institution or church. Furthermore, this approach is at odds with clear Supreme Court precedent that has always recognized the right of the individual to have his own set of religious beliefs. *United States v. Lee*, 455 U.S. at 257; *Thomas v. Review Board*, 450 U.S. at 716; *Gillette v. United States*, 401 U.S. 437 (1971).

> Intrafaith differences [of what is 'scripturally' acceptable] are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their faith. Courts are not arbiters of scriptural interpretation.

Thomas v. Review Board, 450 U.S. at 715-716.

Accordingly, the Court is not willing to say that because a religious belief is not generally held or is not documented, or because it is newly arrived upon, that it is not deserving of first amendment protection. *See, Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 317 (5th Cir. 1977) (J. Goldberg, concurring).

The record reveals that Mr. Schindler sincerely believes

the Bible requires that the mother be at home with her young children, and that his decision that Mrs. Hoskinson's contract not be renewed was based upon his religious conviction that to allow her to continue teaching while she had a small child at home would be to run afoul of the teachings in the Bible. The court cannot accept Defendants' contention that the initial decision not to renew Mrs. Hoskinson's contract was prompted solely by Mr. Schindler's personal philosophy and that, therefore, OCRC review of that decision could not even raise potential first amendment concerns. Though the belief may not be documented or as well known or accepted as other precepts discussed during the proceeding, the evidence clearly established that Mr. Schindler's conduct was based upon religiously founded principles. The Court does not feel it proper to relegate this personnally held religious belief to an artificial lesser status of "personal philosophy" simply because the belief might not have been a clearly articulated tenet at DCS. The Court finds, therefore, that the initial decision not to renew Mrs. Hoskinson's teaching contract was founded on religious precepts and therefore falls within the ambit of the first amendment's protection afforded to the free exercise of religion.

The Board's decision to discharge Mrs. Hoskinson because she had not followed the Biblical Chain of Command and the requirement of always giving a good report is a decision more clearly founded in religious beliefs as the record reveals that this belief is both well articulated and generally held and ascribed to by the DCS staff and administration. The Teacher's Contract, for example, emphasizes and requires conformance with what is viewed as the Biblical means of arbitrating disputes internally, never taking a dispute "before a court of law". Mrs. Hoskinson acknowledged when signing the contract as well as in her application for employment that she believed in "God's chain of command." (Doc. #25, answer to question 10). Nonetheless, in contravention of this principle, Mrs. Hoskinson consulted an attorney when she learned her contract would not be renewed. Thus,

when the Board made the determination that Mrs. Hoskinson's contract should be terminated because of "philosophical differences" stemming from her taking her complaint about the nonrenewal of her contract to an attorney, this decision was consistent with the Board's expressed and established religious belief that disputes be resolved internally and in accordance with the Biblical Chain of Commands.

Both decisions made with respect to Mrs. Hoskinson's continued employment at the school were, therefore, a means for Plaintiffs to carry out, or to put into practice, their religious beliefs. Having determined that both decisions which OCRC seeks to review involved the exercise of Plaintiffs' religious beliefs, the Court must now examine the extent to which the investigation and pending hearing would burden the free exercise of Plaintiffs' religious beliefs and whether any burden that may arise can be justified because of the existence of a compelling state interest which will be furthered by conducting such an investigation and hearing. *Sherbert v. Verner,* 374 U.S. at 403. The inquiry first focuses on the magnitude of the infringement, or impact upon, Plaintiffs' free exercise rights. Within this analysis, the courts try to determine how great a burden the state is attempting to place on the complainants' right to practice their religion. Not infrequently, this analysis involves attempting to determine whether the asserted religious belief upon which the state seeks to impinge is *central* to the overall religious doctrine of the complainants. *Yoder,* 406 U.S at 216, *EEOC v. Pacific Press,* 676 F.2d at 1279, *EEOC v. Mississippi College,* 626 F.2d at 488; *Sequoyah v. T.V.A.,* 620 F.2d 1159, at 1164 (6th Cir. 1980); *Lakewood, Ohio Congregation of Jehovah's Witnesses v. Lakewood,* No. 82-3004, at p. 7, February 3, 1983 (6th Cir.).

In *Wisconsin v. Yoder,* for example, the Court examined the religious practice which the Amish sought to protect from state interference to assess the impact that denying continuation of that practice would have upon the Amish religious community generally. The religious belief and corresponding practice at stake in *Yoder,* was the conviction that after the

eighth grade, Amish children should continue their education within the Amish community. The Amish wished to avoid exposing their children to values and beliefs diametrically opposed to those of the Amish way of life which exposure would have resulted were their children to continue with formal secondary education outside the Amish community as was ostensibly mandated by the state law at issue. Thus, in *Yoder,* the Court found that enforcement of the state's mandatory school attendance law or the Amish community would not only have the effect of forcing the Amish to act in a manner contrary to their religious beliefs and practices, but would also result in removing the children from the Amish community during the "crucial and formative period" which would create a barrier to the child's eventual integration into the Amish community. 406 U.S. at 216-19. Because the Amish religious beliefs and their way of life are so inextricably intertwined, wrenching the children out of the home and community and teaching them values and subjects contrary to the beliefs held by the Amish was viewed as having a potentially devastating effect on the continuation of this religious sect. The practice of educating their children at home after the eighth grade was viewed as so *central* to the perpetuation of the Amish faith that it overrode the state's lesser interest in mandatory formal education beyond the eighth grade.

Thus, the question of the centrality of a religious belief sought to be regulated or burdened by the state requires a determination of the extent to which the threatened state infringement would interface or limit Plaintiffs' ability to continue to believe and practice their espoused religious tenents. What is *not* involved in the determination of centrality is an evaluation of which beliefs asserted by the plaintiffs are more important or form the "real" tenets of the Plaintiffs' faith. To engage in such a substantive evaluation of a Plaintiffs' asserted religious beliefs would involve the Court in the sort of scriptural interpretation for which the courts are quite ill-suited. *U.S. v. Lee,* 455 U.S. at 257; *Thomas v. Review Board,* 450 U.S. at 715.

To begin with, the Court notes that the threatened state action in the present matter does not give rise to concerns over the future viability of the complainants' religion such as were presented to the Supreme Court in *Yoder*. Quite the contrary, the action the state proposed to take at this juncture would appear to impinge only slightly on Plaintiffs' free exercise rights. The extension of OCRC jurisdiction over DCS to conduct an investigation into a charge of sex discrimination and retaliatory employer actions, would enable the OCRC to interject itself into the dispute resolution process at DCS. Were the Commission to determine, as it did in the instant matter, that probable cause exists that DCS was or is acting in a prohibited discriminatory fashion, DCS would either have to voluntarily settle the dispute (by agreeing to a consent decree and conciliation order or by proffering an acceptable offer of its own) or face having charges filed against it and defending itself at an administrative hearing. During the investigative and hearing process, certain staff and administrators at DCS would find themselves having to respond to Commission inquiries and to relate their impressions of the events giving rise to the charges. Moreover, if an aggrieved employee sought legal assistance or if an employee participated in an OCRC investigation or hearing, DCS could not discriminate or act adversely towards that employee for so acting. Though to DCS, such action would constitute a valid ground for dismissal for what would be viewed as a violation of the Biblical Chain of Command, to the OCRC, such action would constitute a violation of the prohibition against retaliatory employer conduct. All of this procedure would also require Plaintiffs to involve an outside party in the resolution of certain of their disputes despite their avowed belief in the internal resolution of differences through adherence to the Biblical Chain of Command and the proscription against giving a bad report. There is nothing in the record, however, to suggest that there will be frequent or recurring clashes between Plaintiffs' employment practices and the statute's proscriptions against sex discrimination. In all likelihood, the majority of disputes arising within the school will continue to be resolved internally. The unknown

and possibly non-existent future charges of sex discrimination that may be leveled at the school and spur involvement of the OCRC cannot be viewed as creating any sort of substantial risk of impingement by the state into Plaintiffs' exercise of their religious belief of adherence to the Biblical Chain of Command their desire to require that their employees resolve disputes internally. For the most part, Plaintiffs will continue to be free to believe and to practice their belief in the internal resolution of differences. The Court concludes, therefore, that the OCRC investigation and hearing presently at issue and any occasional and as yet uncertain future investigation and hearings on charges of sex discrimination and retaliatory employer action provide but a brief and infrequent imposition upon Plaintiffs' belief that disputes be resolved internally.

The instant controversy, however, raises the concern that a second religious belief, shared by at least some of the Plaintiffs, will be impinged upon if the OCRC hearing is allowed to go forward. This second religious belief, that the mother should be at home with her young children, led to the initial nonrenewal of Mrs. Hoskinson's contract despite the prohibition in Chapter 4112.02(A) and 4112.01(B) that an employer not take discriminatory actions against a woman because she is pregnant. To the extent the espoused belief of the mother's role in the home leads to administrative decisions which conflict with the prohibitions against sex discrimination, denying the administration the freedom to act on this belief would not appear to place more than a minimal burden on the Plaintiffs' free exercise rights. Those who believe that the Bible requires the mother of young children to be at home and not work are left free to exercise or put into practice that religious belief. Nothing in Chapter 4112 would force any of the Plaintiffs themselves to act contrary to this belief. Unlike in *Yoder*, for example, where application of the challenged statutory provisions to the Amish would have required them to act in a fashion contrary to their religious beliefs by sending their children to public schools at a time when their beliefs dictated educating them within the community, there

is no statutory requirement in Chapter 4112 that the woman must work or must leave the home despite her desire to stay at home and tend to the upbringing of her children. Thus none of the parents, teachers, or administrators at DCS would themselves be forced to engaged in conduct violative of their religious beliefs were the proscriptions against sex discrimination in employment contained in Chapter 4112 brought to bear on DCS. Instead, all that would be asked of Plaintiffs is that they not take adverse employment action against a woman if she does not concur in their interpretation of what the Bible requires of a mother. Thus, as with the infringement on Plaintiffs' belief in the Biblical Chain of Command, the Court finds that the threatened impingement on the asserted belief of at least some of the Plaintiffs that a mother be at home with her young children will be only minimally and in fact only tangentially, burdened should the OCRC exercise its jurisdiction over the instant matter.

Even though the Court finds that the threatened burden on Plaintiffs' free exercise rights is, at this stage, only minimal, *any* burden imposed by the state on free exercise rights must be justified by a *compelling* state interest. *Sherber v. Verner*, 379 U.S. at 403.

In examining the asserted state interest, the Court finds that the state does in fact have a compelling interest in eliminating all forms of discrimination. This interest of the state parallels that of the federal government as reflected in the enactment of Title VII. *See, EEOC v. Pacific Press*, 676 F.2d at 1280; *EEOC v. Mississippi College*, 626 F.2d at 489; *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d at 277, 286 (5th Cir. 1981). In *Pacific Press*, the Court stated that "[b]y enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.'" *EEOC v. Pacific Press*, 676 F.2d at 1280, *citing*, S. Rep. No. 872, 88th Congr., 2d Sess. pt. 1 at 11, 24 (1964); and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Likewise, the Supreme Court has recognized and sought to protect women from what it has viewed as a history of severe

and pervasive discrimination against them. *See, Mathews v. Lucas*, 427 U.S. 495 (1976). In *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), the Court reviewed the history and detrimental and wasteful effect of discrimination against women and discussed the Congressional intent to end such discrimination through passing Title VII of the Civil Rights Act of 1964.

Coupled with this concern for eliminating discrimination is the concern for protecting the "freedom of personal choice in matters of marriage and family life." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 640 (1974) *citing, Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Gnswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *LaFleur*, for example, the Court found that restrictive maternity leave regulations at a school could serve to penalize the pregnant teacher for having exercised her protected freedoms. *Cleveland Board of Education v. LaFleur*, 414 U.S. at 640.

The Ohio Legislature has also sought to protect women's rights and freedom of personal choice in determining to bear children through Ohio Rev. Code Chapter 4112 which prohibits, *inter alia*, discrimination in employment and housing on the basis of sex. Subsequently, the legislature confirmed its concern about discrimination against women by adding the clarifying language of §4112.01 (B) to make clear that discrimination "on the basis of sex" or "because of sex" includes:

> (B) For the purposes of divisions (A) to (F) of section 4112.02 of the Revised Code, the terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, childbirth, or related medical conditions shall be treated

> the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

In view of the clear mandate of Chapter 4112, the Court simply cannot conclude that Ohio shares any less of a compelling interest in eliminating all forms of discrimination, including sex discrimination, than that expressed by Congress or the Supreme Court. Moreover, because the state does not have a compelling interest in eliminating the various forms of sex discrimination, the state likewise has a compelling interest in insuring that individuals be free to protect their rights under Chapter 4112 without fear of employer reprisal. The right not to be subjected to invidious discrimination would be but a hollow right if an employer were free to retaliate against employees for attempting to protect or aid others in protecting their rights under Chapter 4112. The Court finds, therefore, that though the exercise of jurisdiction by the OCRC over DCS to investigate and conduct a hearing on a charge of sex discrimination and/or retaliatory employer action may infringe incidentally or minimally on Plaintiffs' free exercise rights, any burden resulting is founded upon a compelling state interest in eliminating sex discrimination in employment.

The reminaing factor to be considered is the extent to which the state's interest would be frustrated if the exemption sought were in fact granted. In *EEOC v. Mississippi College*, the Fifth Circuit, in deciding if a Baptist college should be exempted from Title VII, looked at the nature of the institution seeking exemption and the impact on society that would result from granting exemptions to comparable institutions. The Court concluded:

> Although the number of religious educational institutions is minute in comparison to the number of employers subject to Title VII, their effect upon society at large is great because of the role they play in educating society's

> young. If the environment in which such institutions seek to achieve their religious and educational goals reflects unlawful discrimination, those discriminatory attitudes will be perpetuated with an influential segment of society, the detrimental effect of which cannot be estimated.

EEOC v. Mississippi College, 626 F.2d at 489.

Similary, in *EEOC v. Southwestern Baptist Theological Seminary*, the Fifth Circuit again looked to the "quantitative and qualitative" impact on society that would stem from granting exemptions from VII to institutions such as the one presently before the Court. *EEOC v. Southwestern Baptist*, 651 F.2d at 287. The role the institution in question played in educating and influencing the young was again emphasized, along with the potentially deletorious impact on the young as well as on the goal of eliminating discrimination, of having youth education in "an atmosphere of discrimination." *Id.*

In considering the impact on the state's interest should the requested exemption from the social security laws be granted, the Supreme Court in *United States v. Lee* found it could not allow the Amish to be exempted from paying social security taxes despite having found that nonpayment of such taxes was founded upon religious beliefs. The Court emphasized that the social security system would be "difficult to accommodate . . . with myriad exceptions flowing from a wide variety of religious beliefs." *United States v. Lee*, 455 U.S. at 260-61.

In other instances, the Court has looked to the administrative burdens that would result from creating exemptions for similarly situated individuals or groups. In *Thomas v. Review Board*, for example, accommodating the claim of the Jehovah's Witness who sought unemployment compensation after having quit his job for religious reasons, did not present any serious risk of multiple similar future claims nor, therefore, any consequent administrative problems. *Thomas v. Review Board*, 405 U.S. at 719. Similarly, in *Wisconsin v. Yoder*, the

Court felt the exemption it was creating from the state's compulsory education law was sufficiently narrow that "few other religious groups or sects" would qualify. *Wisconsin v. Yoder*, 406 U.S. at 236.

The common thread that runs throughout these cases is the concern, not just for the ability of the state to accommodate the exception currently sought, but also for what granting this particular exemption would portend for the future of the state's interest. As noted by Justice Goldberg in his concurring opinion in *Brown v. Dade Christian Schools, Inc.*:

> When a court can recognize a free exercise claim without inviting numerous additional claims, focusing on the particular consequences of the ruling in the case at bar is appropriate. But when recognizing the claim will predictably give rise to further claims, many of which will undoubtedly be fraudulent or exaggerated, the situation is different.

Brown v. Dade Christian Schools, Inc., 556 F. Supp. at 322 (J. Goldberg, concurring).

In determining the extent to which granting DCS's exemption from Chapter 4112 would "impede the objectives sought to be advanced by the state," the Court must be mindful, as in the opinions cited above, of the process it may be setting in motion. The age and concommitant impressionability of the children attending DCS probably render them more vulnerable to the influence of their environment than might be older students attending college. Exposure to an educational atmosphere wherein any form of unlawful discrimination is practiced could have a substantial impact on the values these children eventually carry out into the world when they leave school. Furthermore, the cumulative impact on the state's goal of ending discrimination could be significant if comparable religiously oriented schools and places of business likewise sought and were to receive exemptions

from the prohibitions contained in Chapter 4112. The exemptions sought herein is neither so narrow nor unlikely of repetition that the Court need not be concerned about the likelihood of setting in motion what could well be a whole series of complaints from employers seeking exemptions from all or part of the anti-discrimination provisions contained in Chapter 4112, and, quite conceivably, the comparable proscriptions contained in Title VII.

To the contrary, the Court finds the number of recent challenges by religious employers to the jurisdiction of EEOC under Title VII is at least some evidence of the likelihood other religious employers may want to be exempted from Chapter 4112. *See, e.g., EEOC v. Pacific Press*, 676 F.2d 1272; *EEOC v. Mississippi College*, 626 F.2d 477; *EEOC v. Southwestern Baptist*, 651 F.2d 277; *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa (1980); *McClure v. Salvation Army*, 460 F.2d 553; *Ritter v. St. Mary's College*, 495 F. Supp. 724; *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310; *Fiedler v. Marumsco Christian School*, 631 F.2d 1144. As claims for additional exemptions were presented to this Court,

> [T]he court [would have to] either recognize many such claims . . . or draw fine and searching distinctions among various free exercise claimants. The latter course would raise serious constitutional questions with respect to the proper functioning of courts in sensitive religion clause adjudication. Courts are of course competent to sort sincere from insincere religious contentions, but the process of doing so, and of striking different balances when confronted with sincere claims posing subtle variations in religious dogma, inevitably embroils courts undesirably in religious controversies. When numberous claims are likely, recognizing some while rejecting others unavoidably forces courts to pick and choose among religions and to draw subtle distinctions on the basis of criteria with which no governmental unit should ever become entangled.

Brown v. Dade Christian Schools, Inc., 556 F.2d at 332 (J. Goldberg, concurring).

The Court finds, therefore, that though the extension of OCRC jurisdiction over DCS to investigate and to conduct a hearing on Mrs. Hoskinson's discharge may impinge to a limited degree on Plaintiffs' free exercise rights, the state has a compelling and overriding interest in eliminating sex discrimination in the employment setting. As the Supreme Court recently reaffirmed in *United States v. Lee*, "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." *United States v. Lee*, 455 U.S. at 261. "Not all burdens on religion are unconstitutional." *Id.* at 257, citing, *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Reynold v. United States*, 98 U.S. 145 (1879). *See also, Bob Jones University v. United States*, 103 S.Ct. at 2034-35 (1983). Though two religious beliefs may arguably be burdened somewhat by allowing the OCRC to investigate and to conduct a hearing on charges of sex discrimination and retaliatory employer conduct at DCS, the state's interest in eradicating invidious discrimination and in providing protection to those who seek to vindicate their rights under Chapter 4112 are sufficiently compelling to justify the slight impingement that may result on Plaintiffs' free exercise rights. Furthermore, Court finds that granting the exemption sought could lead to a course of events that would "embroil the courts undesirably in religious controversy" and substantially undermine the state's objective of eradicating discrimination. Thus, the Court finds that Plaintiffs' free exercise rights would not be unconstitutionally burdened by having the OCRC exercise jurisdiction over the disputed termination of Mrs. Hoskinson.

VII. ESTABLISHMENT CAUSES

Plaintiffs also contend that extension of jurisdiction over DCS by the OCRC will violate the constitutional prohibition against the state's establishment of religion because jurisdiction will lead to an excessive amount of entanglement in the school's sectarian affairs.

The first amendment commands that there shall be "no law respecting an establishment of religion." Though hardly presenting a clear proclamation of what the state may do, the courts have generally found establishment clause problems when the state has acted in some way to benefit religious institutions generally, or provided some sort of benefit to some, but not all religious groups. *See, e.g., Everson v. Board of Education*, 330 U.S. 1 (1947); *Engel v. Vitale*, 370 U.S. 421 (1962); *Tilton v. Richardson*, 403 U.S. 672 (1971). To the extent a particular religion or religious practice is claimed to have been burdened or regulated or inhibited by the state, such claims have generally been couched in term of free exercise clause challenges.

Establishment Clause problems, however, may also arise when the state attempts to insert itself too deeply into the management and administration of a church or religious institution. As the Court in *Waltz v. Tax Commissioner* explained, the forbidden areas of state conduct under the Establishment Clause are "sponsorship, financial support, and *active involvement of the sovereign in religious activity.*" *Waltz v. Tax Commissioner*, 397 U.S. 664, 668 (emphasis added). The danger of "active involvement" is that, to the extent the state becomes an active participant in the decision-making process of a church or religious institution or attempts to guide policy, or discretionary or disciplinary decisions, over time it is apt to find itself at loggerheads with church officials over doctrinal matters that are interwoven with all of these administrative functions. Whenever the state attempts to replace church or religious official's decisions in such matters with its own, it is in effect engaging in conduct "respecting the establishment of a religion." "A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

The Supreme Court has articulated a test to be applied to determine if a statute results in the state running afoul of the Establishment Clause. Three requirements must be met if the statute is to pass constitutional muster: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be that it neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Waltz v. Tax Commissioner,* at 673." *Lemon v. Kurtzman,* 403 U.S. at 612-13.

Focusing on the last factor, the Court in *Lemon* emphasized that "prior holdings do not call for total separation between church and state, total separation is not possible in an absolute sense . . . judicial caviats against entanglements must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship . . . . Thus we must examine the form of the relationship for the light that it casts on the substance." *Id.* at 614.

What is eminently clear from the language of the Supreme Court is that this is an area given neither to precise or pat rules nor to generalizations among situations that fail to take account of real differences. Determining whether there is the likelihood of *excessive* government entanglement offensive to the first amendment requires an examination of the "character and purposes of the institutions that are benefited [or burdened], the nature of the aid [or burden] that the State provides [or imposes], and the resulting relationship between the government and the religious authority." *Id.* at 615. *See also, Catholic Bishop,* 440 U.S. 490 (1979); *EEOC v. Pacific Press Publishing,* 676 F.2d 1271 (9th Cir. 1982); *EEOC v. Mississippi College,* 626 F.2d 477 (5th Cir. 1980); *EEOC v. Southwestern Baptist,* 651 F.2d 277 (5th Cir. 1981); *Grace Brethren Church of California,* No. CV-79-93 MRP, April 6, 1981 (C.D. Calif.).

Turning to the statute in the present matter, the Court finds that it has the secular purpose of eliminating unlawful

discriminatory practices in employment, housing and debtor-creditor matters. To accomplish this purpose, it provides for the establishment of the Ohio Civl Rights Commission with specified powers to respond to complaints or to initiate investigations of unlawful discriminatory practices. The primary effect of the statute "neither advances nor inhibits religion" but rather has the effect of accomplishing its clear purposes of eradicating unlawful discrimination.

In determining if the statute at issue fosters excessive government entanglement, the Court once again must emphasize the pervasively religious character of the school. The Court need not repeat what it has said above about the origin, structure, and mission of DCS. In cases involving similarly religiously oriented schools, the Supreme Court has repeatedly emphasized the danger inherent when the government acts within these schools either through aid or regulation. In either instance, by financial support or presence through regulation, the "substantial religious activity and purpose" of such schools gives rise to the threat of forbidden church-state entanglement. *Lemon, supra,* at 615. *Wolman v. Walter,* 433 U.S. 229 (1977); *Meek v. Pittinger,* 421 U.S. 349 (1975); *see also, Catholic Bishop, supra; Tilton v. Richardson,* 403 U.S., *supra; Board of Education v. Allen,* 392 U.S. 236 (1968); *Everson v. Board of Education,* 330 U.S., *supra.* The question, then, must focus on how far the state may intrude into such schools without becoming *excessively* entangled.

To determine if excessive government entanglement is threatened by the OCRC in this matter, the Court must address the facts that have actually been presented. As stated above in Section VI, the issue to be resolved is whether the OCRC may exercise jurisdiction over DCS to investigate and to conduct a hearing upon a charge of sex discrimination without violating the first amendment rights of Plaintiffs. In particular, the inquiry here is whether the exercise of jurisdiction by OCRC to investigate and to conduct a hearing on the charges would result in excessive government entanglement in the affairs of DCS.

The Court notes that the present action was brought when the OCRC proceedings were still at a preliminary state. To take into account all of the possible levels of government entanglement that *could* have resulted depending upon any number of possible outcomes that might have occurred had the threatened hearing gone forward would be to engage in the determination of hypothetical questions long held to present nonjusticiable controversies. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Thorp v. Housing Authority of City of Dayton*, 373 U.S. 268 (1969); *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972); *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662 (5th Cir. 1967).

The only harm immediately threatened herein is the degree of government entanglement threatened by attempting to investigate and to conduct a hearing on whether DCS engaged in or is continuing to engage in discriminatory conduct prohibited by ORC §§4112.01(A) (sex discrimination) and (I) (retaliatory employer practices). In *Dolfer v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980), the Court examined whether hearing and determining a sex discrimination charge filed by a teacher against a parochial school would lead to excessive government entanglement in the religious practices of the school. Comparing the entanglement threated by the NLRB in *Catholic Bishop* to that threatened should the court exercise jurisdiction, the court found "[s]uch expansive scrutiny into the day-to-day administration of defendant's school would not in the least be required in this case." *Id.* at 270.

Similarly, in *Russell v. Belmont College*, 554 F. Supp. 667 (1982), the court analyzed whether the Equal Pay Act could apply to a "pervasively sectarian" college without resulting in excessive entanglement. The Court reasoned,

> [N]o relationship is created between Belmont and the federal government until Belmont College violates or is alleged to have violated the Act. Then Belmont College is subject only to limited investigation and de novo judicial

> determination. While this may impose some minimum burden on Belmont, the resulting limited relationship created with the federal government leads this Court to conclude . . . that application of the EPA to Belmont College will not "foster excessive government entanglement with religion.

Id. at 678.

Having found Title VII to grant the EEOC jurisdiction over a religiously based college, the Court in *Mississippi College* did not find requiring and enforcing compliance with a *Subpoena ad Testificandum / Duces Tecum* to result in excessive entanglement despite the fairly expansive amount of information sought. *EEOC v. Mississippi College*, 626 F.2d at 489. The Court analyzed the degree of entanglement resulting from Title VII being brought to bear in the Baptist College.

> The relationship between the federal government and the College that results from the application of Title VII does have limits both in scope and effect. It is true that the subpoena issued to the College by the EEOC presages a wide ranging investigation into many aspects of the College's hiring practices. Furthermore, should the EEOC conclude that cause exists to believe that the College discriminates on the basis of sex or race, the College in all likelihood would be subjected to a court action if it did not voluntarily agree to alter its actions. The College would, however, be entitled to a de novo determination of whether its practices violate VII. In that action the College could reassert the protection of the first amendment prior to being ordered to amend it practices. If the challenged employment practices survived the scrutiny of the district court, the EEOC could not attack again those particular practices absent some change in circumstances.

In *Pacific Press*, again reviewing the question of entanglement between the state and a church related company which would result from the application of Title VII, the Court found that

"[t]he present case is distinguishable from *NLRB v. Catholic Bishop* because neither the judgment in this suit nor Title VII's enforcement mechanisms result in any ongoing scrutiny of [Pacific] Press' operations. The potential for ongoing entanglement or continuous supervision of church affairs by the government's negotiations is the critical entanglement issue which deserves the most emphasis." *EEOC v. Pacific Press*, 676 F.2d 1282 (9th Cir. 1982).

The enforcement procedure currently challenged poses no more threat of ongoing, continuous supervision than that presented under Title VII. Arguably, Title VII may be seen as having even less potential for leading to entanglement than ORC §4112 because the EEOC lacks the power given to the OCRC to initiate its own investigations. Nonetheless, the hypothetical level of entanglement resulting from an OCRC initiated investigation that may or may not ever be initiated in the future, is not presently before this Court. Whatever entanglement of the state into the religious affairs at DCS that may result from this investigation and the threatened hearing, or that may stem from any future charges of sex discrimination, will be sufficiently limited both in length and in the degree to which they intrude into the overall operation of the school, that any fears of excessive government entanglement are minimal. Thus, what is lacking at this stage is any indication that the investigation and hearing on charges of sex discrimination and retaliatory employer practices will necessarily result in the sort of hovering omnipresence of the OCRC in the affairs of DCS which would run afoul of the Establishment Clause's prohibition against excessive government entanglement in religion. The Court concludes that the occasional intrusion of the OCRC into the administration of DCS to respond to charges of sex discrimination and retaliatory employer practices will not lead, based upon the facts now before the Court, to an excessive level of government entanglement in Plaintiffs' religious beliefs and practices and thus does not run afoul of the proscription contained in the Establishment Clause of the United States Constitution.

VIII. CONCLUSION

Having reviewed all of the evidence presented in this matter, the Court concludes that the exercise of jurisdiction by the OCRC over Dayton Christian Schools to investigate the charges of sex discrimination and retaliatory employer actions and to conduct a hearing as part of said investigation would not appear *at this juncture* to impermissibly impinge on Plaintiffs' first amendment rights to freedom of religion. This is not a conclusion that the Court reaches lightly or without concern for the course of events that may follow. Throughout this decision and entry, the Court has repeatedly emphasized the narrowness of the issue actually presented. The Court has also noted above some of the troublesome ways in which the Ohio statute *could* be brought to bear on DCS. In permitting the OCRC to exercise jurisdiction over the instant controversy, the Court has in no way determined either that the full force of OCRC's jurisdiction under ORC Chapter 4112 can be brought to bear on DCS without impermissibly burdening Plaintiffs' first amendments rights or, even with respect to the present controversy, that any remedy deemed appropriate by the OCRC should they find DCS liable, would necessarily present no further first amendment problems. However, because many of the concerns voiced by Plaintiffs about state encroachment on their religious freedoms remain as yet only possibilities, they cannot serve as the basis for the issuing of a permanent injunction against the OCRC. Limited by the facts presented to it, the Court must decline to grant the equitable relief sought. Without in any way intending to downplay Mrs. Hoskinson's rights under ORC Chapter 4112, the Court can only express, the hope that in any future proceedings that may be conducted, due regard be given to Plaintiffs' sincerely held religious beliefs and that every effort be made to impose no greater burden than is absolutely necessary to resolve the instant controversy.

The Court finds, therefore, that Plaintiffs have not succeeded on the merits of their claim in that the statutory

provisions granting OCRC jurisdiction are not unconstitutionally overbroad or void for vagueness, nor does the exercise of jurisdiction by the OCRC over the present dispute impermissibly impinge on Plaintiffs' free exercise rights or result in excessive government entanglement in religion. The Court is unable to grant the permanent injunction which Plaintiffs seek in this action.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

WALTER H. RICE
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-3-80-410

DAYTON CHRISTIAN SCHOOLS, et al.
v.

OHIO CIVIL RIGHTS COMMISSION, et al.

WALTER H. RICE, Judge

Decision by Court. This action came to or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiffs have not succeeded on the merits of their claim in that the statutory provisions granting OCRC jurisdiction are not unconstitutionally overbroad or void for vagueness, nor does the exercise of jurisdiction by the OCRC over the present dispute impermissibly impinge on Plaintiffs' free exercise rights or result in excessive government entanglement in religion. The Court is unable to grant the permanent injunction which Plaintiffs seek in this action.

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Filed 1/6/84
Kenneth J. Murphy, Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION, DAYTON, OHIO

DAYTON CHRISTIAN SCHOOLS, INC.
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Dayton, Ohio 45405

and

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and

CHRISTIAN TABERNACLE
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and

CLAUDE E. SCHINDLER, JR.
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and

STEPHEN T. HOUSE, M.D. and his Wife, CAMILLIA HOUSE
2406 Fox Run Road
Centerville, Ohio 45459

and

: CASE NO. C-3-80-410

PAUL PYLE
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Dayton, Ohio 45420

Plaintiffs

-vs-

OHIO CIVIL RIGHTS COMMISSION
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and

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Columbus, Ohio 432115

and

CLINGAN JACKSON,
Commissioner
Ohio Civil Rights Commission
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Columbus, Ohio 43215

and

WADE FRANKLIN, III.,
Commissioner
Ohio Civil Rights Commission
220 Parsons Avenue
Columbus, Ohio 43215

and

TEMPORARY RESTRAINING ORDER

THOMAS A. BROWN,
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Ohio Civil Rights Commission
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and

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Columbus, Ohio 43215

Defendants

WHEREAS, in the above-named cause it has been made to appear by the verified complaint filed herein, and affidavit submitted by the Plaintiff, Claude E. Schindler, Jr., which was on this 6th day of October, 1980, presented to the Honorable Walter H. Rice, Judge of the United States District Court for the Southern District of Ohio, that a restraining order preliminary to hearing upon motion for a preliminary injunction should issue, without notice because immediate and irreparable injury, loss, or damage will result to the plaintiffs before notice can be served and a hearing had thereon and defendants or their attorneys can be heard in opposition, in that plaintiffs will suffer deprivation of rights guaranteed by the Constitution of the United States, more specifically, plaintiffs will suffer deprivation of the free exercise and establishment of their religious beliefs, and whereas it was made to appear by certificate of plaintiffs' attorney in writing that efforts were made to give notice of the application for a restraining order herein and that notice should not be required.

NOW, THEREFORE on motion of the plaintiffs

IT IS ORDERED that the Defendants, Ohio Civil Rights Commission, Ronald C. Morgan, Clingan Jackson, Wade Franklin, III., Thomas A. Brown, Thaddeus A. Garrett, Jr.,

Robert D. Brown, Rebecca K. Haley Ross, William J. Brown, Keith S. Mesirow and Donald Conley, and each of them, their agents, successors, deputies, servants and employees, and all persons acting by, through or under them or either of them or by or through their order, be, and they are hereby restrained until the 16th day of October, 1980, unless within said time this order is extended for good cause shown or unless defendants herein consent that it may be extended for a longer period, from proceeding to a public hearing concerning the employment practices of Plaintiff, Dayton Christian Schools, Inc., or otherwise intermeddling with, coercing, intruding upon or becoming entagled in the plaintiffs' free exercise and establishment of their religious beliefs.

This temporary restraint is on condition that a bond be filed by plaintiffs herein the sum of $10.00 ten dollars, conditioned for payment of such costs and damages as may be incurred or suffered by any party who was found to have been wrongfully restrained or enjoined, said to be approved by this Court.

IT IS FURTHER ORDERED that plaintiffs' motion for preliminary injunction be set down for hearing on the 16th day of October, 1980 at 1:00 P.M.

Issued at 3:23 o'clock P.M. this 6th day of October, 1980.

[Filed October 6, 1980]

APPROVED:

WALTER H. RICE, District Judge

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF OHIO

No. C-3-80-410

DAYTON CHRISTIAN SCHOOLS, INC., et al.
v.

OHIO CIVIL RIGHTS COMMISSION

WALTER H. RICE, Judge

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Final judgment is, accordingly, entered in favor of the Plaintiffs and against the Defendant herein. Costs, both at the trial court and the appellate court level, are to be paid by the Defendant-Appellee.

[File Stamp Deleted]

Filed 8/13/85
KENNETH J. MURPHY, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

DAYTON CHRISTIAN SCHOOLS, INC., et al. Plaintiffs	)	
vs.	)	CASE NO. C-3-80-410
CIVIL RIGHTS COMMISSION Defendant	)	

ENTRY OF PRELIMINARY INJUNCTION IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANT, PURSUANT TO MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT; ORDER OF COSTS IN FAVOR OF PLAINTIFFS; TERMINATION ENTRY.

[Filed August 18, 1985]

Pursuant to the mandate from the United States Court of Appeals for the Sixth Circuit (Doc. #43), dated July 19, 1985, this Court grants the Plaintiffs' request for permanent injunctive relief, thereby enjoining the Defendant from exercising jurisdiction over employment discrimination charges against the Plaintiffs, within the factual scenario set forth in this lawsuit.

Final judgment is, accordingly, entered in favor of the Plaintiffs and against the Defendant herein. Costs, both at the trial court and the appellate court level, are to be paid by the Defendant-Appellee.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

WALTER H. RICE
UNITED STATES DISTRICT JUDGE

Copies mailed to:

Bruce E. Pence
Attorney at Law
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Suite 1100
Dayton, OH 45402
(Attorney for Plaintiff)

Keith S. Mesirow
Assistant Attorney General
Civil Rights Section
LeVeque Lincoln Tower
17th Floor
50 West Broad Street
Columbus, OH 43215
(Attorney for Defendant)

IN THE UNITED STATES DISTRICT COURT
FOR THE SIXTH CIRCUIT

DAYTON CHRISTIAN SCHOOLS, INC., et al. Plaintiffs	)	
vs.	)	C.A. NO. 84-3124
CIVIL RIGHTS COMMISSION Defendant	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed Sept. 20, 1985]

Notice is hereby given that the Ohio Civil Rights Commission, Defendant-Appellee in the above-captioned matter, hereby appeals to the Supreme Court of the United States from the judgment reversing the District Court's refusal to grant a permanent injunction entered in this action on June 26, 1985.

This appeal is taken pursuant to 28 U.S.C. Section 1254(2).

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

HELEN M. NINOS
Assistant Attorney General
Chief, Civil Rights Section
50 W. Broad Street
Suite 1718
Columbus, Ohio 43215
(614) 466-7900

COUNSEL OF RECORD
ATTORNEYS FOR DEFENDANTS-APPELLEES

CERTIFICATE OF SERVICE

I, Kathleen McManus, attorney for the Ohio Civil Rights Commission, et al., Defendants-Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of September, 1985, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon all the required parties, or to their counsel of record, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to:

Bruce E. Pence
Logothetis & Pence
111 West First Street
Dayton, Ohio 45402

William Bentley Ball
Ball & Skelly
511 North Second Street, P.O. Box 1108
Harrisburg, Pennsylvania 17108

KATHLEEN McMANUS
Deputy Chief Counsel
Office of the Attorney General
State Office Tower
30 E. Broad Street
Columbus, Ohio 43215

GENERAL PROVISIONS

4112.01 Definitions

(A) As used in sections 4112.01 to 4112.11 of the Revised Code:

(1) "Person" includes one or more individuals, partnership, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. It also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesman, agent, employee, lending institution, and the state and all political subdivisions, authorities, agencies, boards and commissions thereof.

(2) "Employer" includes the state, or any political or civil subdivision thereof, any person employing four or more persons within the state, any person acting in the interest of an employer, directly or indirectly.

(3) "Employee" means an individual employed by an employer but does not include any individual employed in the domestic service of any person.

(4) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or for other mutual aid or protection in relation to employment.

(5) "Employment agency" includes any person regularly undertaking with or without compensation to procure opportunities to work or to procure, recruit, refer, or place employees.

(6) "Commission" means the Ohio civil rights commission created by section 4112.03 of the Revised Code.

(7) "Discriminate" includes segregate or separate.

(8) "Unlawful discriminatory practice" means any act prohibited by section 4112.02 of the Revised Code.

(9) "Place of public accommodation" means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, or other place for the sale of merchandise, or any other place of public accommodation or amusement where the accommodation, advantages, facilities, or privileges thereof are available to the public.

(10) "Housing accommodations" includes any building or structure or portion thereof which is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or lease.

It also includes any housing accommodations held or offered for sale or rent by a real estate broker, salesman, or agent, or by any other person pursuant to authorization of the owner, by the owner, or by such person's legal representative.

(11) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing because of race, color, religion, sex, national origin, handicap, or ancestry, or any limitations based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, sex, national origin, handicap, or ancestry as a condition of affiliation or approval.

(12) "Burial lot" means any lot for the burial of deceased persons within any public burial ground or cemetery, including but not limited to, cemeteries owned and operated by municipal corporations, townships, or companies or associations incorporated for cemetery purposes.

(13) "Handicap" means a medically diagnosable, abnormal condition which is expected to continue for a considerable length of time, whether correctable or uncorrectable by good

medical practice, which can reasonably be expected to limit the person's functional ability, including, but not limited to, seeing, hearing, thinking, ambulating, climbing, descending, lifting, grasping, sitting, rising, any related function, or any limitation due to weakness and significantly decreased endurance, so that he can not perform his everyday routine living and working without significantly increased hardship and vulnerability to what are considered the everyday obstacles and hazards encountered by the nonhandicapped.

(14) Except as otherwise provided in section 4112.021 of the Revised Code, "age" means at least forty but less than seventy years old.

(B) For the purposes of divisions (a) to (F) of section 4112.02 of the Revised Code, the terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in division (B) of section 4111.17 of the Revised Code shall be interpreted to permit otherwise. This division shall not be construed to require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or except where medical complications have arisen from the abortion, provided that nothing in this division precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

112.02 Unlawful Discriminatory Practices

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person,

to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, national origin, handicap, age, or ancestry to:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request indicates, directly or indirectly, that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to:

(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, handicap, age or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, national origin, handicap, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, handicap, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, or labor organization, prior to employment or admission to membership, to:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, handicap, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, handicap, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank seeking to elicit information regarding race, color, religion, sex, national origin, handicap, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency thereof, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain such proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, handicap, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, handicap, age, or ancestry of such group;

(6) Utilize in the recruitment or hiring of persons any employment agency, placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, handicap, age, or ancestry.

(F) For any person seeking employment to publish or

cause to be published any advertisement which specifies or in any manner indicates that person's race, color, religion, sex, national origin, handicap, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, national origin, handicap, age, or ancestry of any prospective employer.

(G) For any proprietor or any employer, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap, age, or ancestry the full enjoyment of the accommodations, advantages, facilities, or privileges thereof.

(H) For any person to:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold housing accommodations from any person because of the race, color, religion, sex, ancestry, handicap, or national origin of any prospective owner, occupant, or user of such housing;

(2) Represent to any person that housing is not available for inspection when in fact it is available;

(3) Refuse to lend money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing or otherwise withhold financing of housing from any person because of the race, color, religion, sex ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of such housing, provided such person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to his principal business and not only as a part of the purchase price of an owner-occupied residence he is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing,

or subleasing any housing or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of such housing;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of such housing.

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member thereof;

(7) Print, publish, or circulate any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing or the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing which indicates any preference, limitation, specifications, or discrimination based upon race, color, religion, sex, ancestry, handicap, or national origin.

(8) Make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, ancestry, handicap, or national origin in connection with the sale or lease of any housing or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing;

(9) Include in any transfer, rental, or lease of housing any restrictive convenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant, provided that the prior inclusion of a restrictive convenant in the chain of title shall not be deemed a violation of this provision;

(10) Induce or solicit or attempt to induce or solicit a housing listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located, or induce or solicit or attempt to induce or solicit such sale or listing by representing that the presence or anticipated presence of persons of any race, color, religion, sex, ancestry, handicap, or national origin, in the area will or may have results such as the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located;

(c) An increase in criminal or antisocial behavior in the area;

(d) A decline in the quality of the schools serving the area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or to discriminate against any person in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, national origin, handicap, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;

(13) Whether or not acting under color of law, by force or threat of force, willfuly injure, intimidate, or interfere with, or attempt to injure, intimidate, or interfere with:

(a) Any person because of race, color, religion, sex, national origin, handicap, or ancestry and because that person is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing, or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting housing accommodations;

(b) Any person because that person is or has been, or in order to intimidate that person or any other person or any class of persons from:

(i) Participating, without discrimination on account of race, color, religion, sex, national origin, handicap, or ancestry, in any of the activities, services, organizations, or facilities described in division (H) (13) (a) of this section;

(ii) Affording another person or class of persons opportunity or protection so to participate.

(c) Any person because that person is or has been, or in order to discourage that person or any other person from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, national origin, handicap, or ancestry, in any of the activities, services, organizations, or facilities described in division (H) (13) (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate.

No person shall discourage or attempt to discourage the purchase by a prospective purchaser of a housing unit, by representing that any block, neighborhood, or area has undergone or might undergo a change with respect to the religious, racial, sexual, or ethnic composition of the block, neighborhood, or area.

(14) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold a burial lot from any person because of the race, color, sex, age, ancestry, handicap, or national origin of any prospective owner or user of such lot.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful practice defined in this section, or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with sections 4112.01 to 4112.11 of the Revised Code, or any order issued thereunder, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K) Nothing in division (H) of this section shall bar any religious or denomination institution or organization, or any charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, or any bona fide private or fraternal organization, from giving preference to persons of the same religion or denomination, or to members of such private or fraternal organization, or from making such selection as is calculated by such organization to promote the religious principles or the aims, purposes, or fraternal principles for which it is established or maintained.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a handicapped person to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the handicapped person, other employees, the general public, or the facilities in which the work is to be performed, or to employ or train a handicapped person in a job that requires him routinely to undertake any task, the performance of which is substantially and inherently impaired by his handicap.

(M) Nothing in division (H) of this section shall be construed to require any person selling or renting property to modify such property in any way or to exercise a higher degree of care for a person having a handicap, nor shall it be construed to relieve any handicapped person of any obligation generally imposed on all persons regardless of handicap in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce his rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful practice occurred, in any court of competent jurisdiction for any legal or equitable relief that will effectuate his rights. A person who files a civil action under this division is, with respect to the practices complained of thereby barred from instituting a civil action under section 4101.17 of the Revised Code or from filing a charge with the Ohio Civil Rights Commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation which may include standards for skills, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this section; however, no such employee benefit plan shall excuse the failure to hire any individual and no such seniority system or employee benefit plan shall

require or permit the involuntary retirement of any individual because of his age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978". P. L. 95-256 Sec. (2) (B), 92 Stat. 189 (1978), 29 U.S.C.A. 623;

(3) Retire an employee who has attained sixty-five years of age but not seventy years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, which equals, in the aggregate, at least twenty-seven thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," P. L. 95-256 Sec. (3), 92 Stat. 189 (1978), 29 U.S.C.A. 631;

(4) To observe the terms of any bona fide apprenticeship program if such program is registered with the Ohio Aprenticeship Council pursuant to sections 4101.25 to 4101.30 of the Revised Code, and is approved by the Federal Committee on Apprenticeship of the United States Department of Labor.

(P) Nothing in Chapter 4112. of the Revised Code prohibiting age discrimination shall be construed to prohibit:

(1) The designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapters 145., 742., 3307., 3309., or 5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) The maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;

(4) The maximum age requirements established for ori-

ginal appointment to a police department or fire department in sections 124.41 and 124.42 of the Revised Code;

(5) Any maximum age not in conflict with federal law which may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or fire fighter;

(6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and fire fighters.

4112.021 Unlawful Discriminatory Practices in Credit Transactions

(A) As used in this section:

(1) "Credit" means the right granted by a creditor to a person to defer payment of a debt, or to incur debt and defer its payment, or purchase property or services and defer payment therefor;

(2) "Creditor" means any person who regularly extends, renews, or continues credit, any person who regularly arranges for the extension, renewal, or continuation of credit, or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit, whether or not any interest or finance charge is required;

(3) "Credit reporting agency" means any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly assembles or evaluates credit information for the purpose of furnishing credit reports to creditors;

(4) "Age" means any age of eighteen years or older.

(B) It shall be an unlawful discriminatory practice:

(1) For any creditor to:

(a) Discriminate against any applicant for credit in the granting, withholding, extending, or renewing of credit, or in the fixing of the rates, terms, or conditions of any form of credit, on the basis of race, color, religion, age, sex, marital status, national origin, handicap, or ancestry, except that this division shall not apply with respect to age in any real estate transaction between a financial institution, a dealer in intangibles, or an insurance company as these terms are defined in section 5725.01 of the Revised Code and its customers;

(b) Use or make any inquiry as to the race; color, religion, age, sex, marital status, national origin, handicap, or ancestry for the purpose of limiting or specifying those persons to whom credit will be granted, except that an inquiry of marital status does not constitute discrimination for the purposes of this section if the inquiry is made for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit, and except that creditors are excepted from this division with respect to any inquiry, elicitation of information, record, or form of application required of such creditor by any instrumentality or agency of the United States, or required of such creditor by any agency or instrumentality to enforce the "Civil Rights Act of 1968," 82 Stat 84, 85, 42 U.S.C.A. 3608(c);

(c) Refuse to consider the sources of income of an applicant for credit, or disregard or ignore the income of an applicant, in whole or in part, on the basis of race, color, religion, age, sex, marital status, handicap, national origin, or ancestry;

(d) Refuse to grant credit to an individual in any name that individual customarily uses, if it has been determined in the normal course of business, that the creditor will grant credit to the individual;

(e) Impose any special requirements or conditions, including but not limited to, a requirement for co-obligors or reapplication, upon any applicant or class of applicants on

the basis of race, color, religion, age, sex, marital status, national origin, handicap, or ancestry in circumstances where similar requirements or conditions are not imposed on other applicants similarly situated, unless the special requirements or conditions that are imposed with respect to age are the result of a real estate transaction exempted under division (B) (1) (a) of this section or are the result of programs that grant preferences to certain age groups administered by instrumentalities or agencies of the United States, a State, or a political subdivision of a State;

(f) Fail or refuse to provide an applicant for credit a written statement of the specific reasons for rejection of the application if requested in writing by the applicant within sixty days of the rejection. The creditor shall provide the written statement of the specific reason for rejection within thirty days after receipt of such request. For purposes of this section, a statement that the applicant was rejected solely on the basis of information received from a credit reporting agency or because the applicant failed to meet the standards required by the creditor's credit scoring system, uniformly applied, shall constitute a specific reason for rejection;

(g) Fail or refuse after June 30, 1976, to print on or firmly attach to each application for credit, in a type size no smaller than used throughout most of the application form, the following notice: "The Ohio laws against discrimination require that all creditors make credit equally available to all creditworthy customers, and that credit reporting agencies maintain separate credit histories on each individual upon request. The Ohio civil rights commission administers compliance with this law." This notice is not required to be included in applications that have a multi-state distribution if the notice is mailed to the applicant with the notice of acceptance or rejection of the application.

(h) Fail or refuse on the basis of race, color, religion, sex, marital status, national, origin, handicap, or ancestry to maintain, upon the request of the individual, a separate account for each individual to whom credit is extended;

(i) Fail or refuse on the basis of race, color, religion, age, sex, marital status, national origin, handicap, or ancestry to maintain records on any account established after November 1, 1976, and to furnish information on the accounts to credit reporting agencies in a manner that clearly designates the contractual liability for repayment as indicated on the application for the account, and if more than one individual is contractually liable for repayment, to maintain records and furnish information in the name of each individual. This section does not apply to individuals who are contractually liable only if the primary party defaults on the account.

(2) For any credit reporting agency to:

(a) Fail or refuse on the basis of race, color, religion, age, sex, marital status, national origin, handicap, or ancestry to maintain, upon the request of the individual, a separate file on each individual about whom information is assembled or evaluated;

(b) Fail or refuse on the basis of race, color, religion, age, sex, marital status, national origin, handicap, or ancestry to clearly note, maintain, and report any information furnished it under division (B) (1) (i) of this section.

(C) This section does not prohibit a creditor from requesting the signature of both spouses to create a valid lien, pass clear title, or waive inchoate rights to property.

(D) The rights granted by this section may be enforced by aggrieved individuals by filing a civil action in a court of common pleas within one hundred eighty days after the alleged unlawful act occurred. Upon application by the plaintiff and in such circumstances as the court considers just, the court in which a civil action under this section is brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of costs. If the court finds that an act prohibited by this section occurred or is about to occur, the court may grant such relief as it considers appropriate, including a permanent

or temprcary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damage of not less than one hundred dollars, together with attorney's fees and court costs.

(E) Nothing contained in this section shall bar a creditor from reviewing an application for credit on the basis of established criteria used in the normal course of business for the determination of the credit worthiness of the individual application for credit, including the credit history of the applicant.

4112.022 Discrimination Against Handicapped at Educational Institutions

As used in this section, "Educational Instution" means a state university or college, state-assisted institution of higher education, a nonprofit educational institution described in Chapter 1713. of the Revised Code, or institution registered under Chapter 3332. of the Revised Code.

It shall be an unlawful discriminatory practice for any educational institution to discriminate against any individual on account of any handicap:

(A) In admission or assignment to any academic program, course of study, internship, or class offered by the institution;

(B) In permitting participation in any activity sponsored by the institution or that takes place on property owned, operated, or controlled by the institution;

(C) In the awarding of any form of financial aid or other benefits available to students;

(D) In admission or assignment to housing or other facilities owned, operated, or controlled by the institution;

(E) In awarding of grades or granting of certificates, diplomas, or degrees offered by the institution

Nothing in this section prohibits any educational institution from establishing bona fide requirements or standards for admission or assignment to academic programs, courses, internships, or classes: for permitting participation in activities; for awarding of financial aid or other benefits; or for the granting of grades, certificates, diplomas, or degrees, which requirements or standards may include reasonable qualifications for demonstrating necessary skill, aptitude, physical capability, intelligence, and previous education.

Nothing in this section requires any educational institution to construct, reconstruct, improve, enlarge, or alter any building, facility, or property owned, operated, or controlled by the institution, in any manner, for the purpose of making the building, facility, or property accessible to the handicapped, provided that this section does not exempt an educational institution from compliance with standards adopted under section 3781.111 of the Revised Code.

OHIO CIVIL RIGHTS COMMISSION

4112.03 Ohio Civil Rights Commission; Members; Terms

There is hereby created the Ohio civil rights commission to consist of five members, not more than three of whom shall be of the same political party, to be appointed by the governor, with the advice and consent of the senate, one of whom shall be designated by the governor as chairman.

Terms of office shall be for five years, commencing on the twenty-ninth day of July and ending on the twenty-eighth day of July, except that upon expiration of the term ending July 29, 1973, the new term which succeeds it shall commence on July 30, 1973 and end on July 28, 1978; upon expiration of the term ending November 22, 1974, the new term which succeeds it

shall commence on November 23, 1974 and end on July 28, 1979; and upon expiration of the term ending July 29, 1976, the new term which succeeds it shall commence on July 30, 1976 and end on July 28, 1981. Each member shall hold office from the date of his appointment until the end of the term for which he was appointed. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall hold office for the remainder of such term. Any member shall continued in office subsequent to the expiration date of his term until his successor takes office, or until a period of sixty days has elapsed, whichever occurs first.

Three members of the commission shall constitute a quorum for the purpose of conducting the business thereof. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission.

Each member of the commission shall be paid a salary fixed pursuant to section 143.09* of the Revised Code plus necessary and actual expenses while traveling on business of the commission.

Any member of the commission may be removed by the governor for inefficiency, neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges against him and an opportunity to be heard publicly thereon.

*143.09 transferred to 124.14.

4112.04 Powers and Duties of the Commission

(A) The Ohio civil rights commission shall:

(1) Establish and maintain a principal office in the city of

Columbus and such other offices within the state as it considers necessary;

(2) Appoint an executive director who shall serve at the pleasure of the commission and be its principal administrative officer. The executive director shall be paid a salary fixed pursuant to Chapter 124. of the Revised Code.

(3) Appoint hearing examiners and other employees and agents as it may deem necessary and prescribe their duties subject to Chapter 124. of the Revised Code;

(4) Adopt, promulgate, amend, and rescind rules to effectuate the provisions of sections 4112.01 to 4112.08 of the Revised Code, and the policies and practices of the commission connection therewith;

(5) Formulate policies to effectuate the purposes of sections 4112.01 to 4112.11 of the Revised Code, and make recommendations to agencies and officers of the state or local subdivisions of government to effectuate such policies;

(6) Receive, investigate, and pass upon written charges made under oath of practices prohibited by sections 4112.02 and 4112.021, and 4112.022 of the Revised Code;

(7) Make periodic surveys of the existence and effect of discrimination because of race, color, religion, sex, national origin, handicap, age, or ancestry on the enjoyment of civil rights by persons within the state;

(8) Report, from time to time, but not less than once a year, to the general assembly and the governor, describing in detail the investigations, proceedings, and hearings it has conducted and their outcome, the decisions it has rendered and the other work performed by it, which report shall include a copy of any surveys prepared pursuant to division (A) (7) of this section and shall include the recommendations of the commission as to remedial action, legislative and otherwise;

(9) Prepare a comprehensive educational program, in cooperation with the department of education, for the students of the public schools of this state and for all other residents thereof, designed to eliminate prejudice on the basis of race, color, religion, sex, national origin, handicap, age, or ancestry in this state, to further good will among such groups, to emphasize the origin or prejudice against such groups, its harmful effects, and its incompatibility with American principles of equality and fair play;

(10) Receive progress reports from agencies, instrumentalities, institutions, boards, commissions, and other entities of this state or any of its political subdivisions and their agencies, instrumentalities, institutions, boards, commissions, and other entities regarding affirmative action programs for the employment of persons against whom discrimination is prohibited by Chapter 4112. of the Revised Code. All agencies, instrumentalities, institutions, boards, commissions, and other entities of this state or its political subdivisions and such policitcal subdivisions that have undertaken affirmative action programs pursuant to a conciliation agreement with the commission, an executive order of the governor, any federal statute or rule, or an executive order of the president of the United States shall file progress reports with the commission annually on or before the first day of November, the commission shall analyze and evaluate the progress reports and report its findings annually to the general assembly on or before the thirtieth day of January of the year immediately following the receipt of the reports.

(B) The commission may:

(1) Meet and function at any place within the state;

(2) Initiate and undertake on its own motion investigations of problems of employment discrimination;

(3) Hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and require the production for examination

of any books and papers relating to any matter under investigation or in question before the commission, and may make rules as to the issuance of subpoenas by individual commissioners.

(a) In conducting a hearing or investigation, the commission shall have access at all reasonable times to premises, records, documents, individuals, and other evidence or possible sources of evidence and may examine, record, and copy such materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation. In such investigations the commission shall comply with the fourth amendment to the United States Constitution relating to unreasonable searches and seizures. The commission or a commissioner may issue subpoenas to compel access to or the production of such materials, or the appearance of such persons, and may issue interrogatories to a respondent, to the same extent and subject to the same limitations as would apply if the subpoenas or interrogatories were issued or served in aid of a civil action in a common pleas court. No person shall be compelled to be a witness against himself.

(b) Upon written application by a respondent, the commission shall issue subpoenas in its name to the same extent and subject to the same limitations as subpoenas issued by the commission. Subpoenas issued at the request of a respondent shall show on their face the name and address of such respondent and shall state that they were issued at his request.

(c) Witnesses summoned by subpoena of the commission are entitled to the same witness and mileage fees as are witnesses in the proceedings in common pleas court.

(d) Within five days after service of a subpoena upon any person, such person may petition the commission to revoke or modify the subpoena. The commission shall grant the petition if it finds that the subpoena requires appearance or attendance at an unreasonable time or place, that it requires production of

evidence which does not relate to any matter before the commission, that it does not describe with sufficient particularity the evidence to be produced, that compliance would be unduly onerous, or for other good reason.

(e) In case of contumacy or refusal to obey a subpoena, the commission or person at whose request it was issued may petition for its enforcement in the court of common pleas in the county in which the person to whom the subpoena was addressed resides, was served, or transacts business.

(4) Create such advisory agencies and conciliation councils, local or statewide, as will aid in effectuating the purposes of sections 4112.01 to 4112.11 and 4112.99 of the Revised Code. The commission may itself, or it may empower these agencies and councils to:

(a) Study the problems of discrimination in all or specific fields of human relationships when based on race, color, religion, sex, national origin, handicap, age, or ancestry;

(b) Foster through community effort, or otherwise, good will among the groups and elements of the population of the state. Such agencies and councils may make recommendations to the commission for the development of policies and procedures in general. Advisory agencies and conciliation councils created by the commission shall be composed of representative citizens serving without pay, but with reimbursement for actual and necessary traveling expenses to those serving on a statewide advisory agency or conciliation council.

(5) Issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of race, color, religion, sex, national origin, handicap, age or ancestry.

PRACTICE AND PROCEDURE

4112.05 Proceedings on Complaint; Findings; Transcript of Record

(A) The Ohio civil rights commission shall, as provided in this section, prevent any person from engaging in unlawful discriminatory practices, as defined in sections 4112.02, 4112.021 and 4112.022 of the Revised Code, provided that before instituting the formal hearing authorized by this section it shall attempt, by informal methods of persuasion and conciliation, to induce compliance with Chapter 4112. of the Revised Code.

(B) Whenever it is charged in writing and under oath by a person, referred to as the complainant, that any person, referred to as the respondent, has engaged or is engaging in unlawful discriminatory practices, or upon its own initiative in matters relating to any of the unlawful discriminatory practices enumerated in divisions (A), (B), (C), (D), (E), (F), (I), or (J) of section 4112.02, or section 4112.021 or 4112.022 of the Revised Code, the commission may initiate a preliminary investigation. Such charge shall be filed with the commission within six months after the alleged unlawful discriminatory practices are committed. If it determines after such investigation that it is not probable that unlawful discriminatory practices have been or are being engaged in, it shall notify the complainant that it has so determined and that it will not issue a complaint in the matter. If it determines after such investigation that it is probable that unlawful discriminatory practices have been or are being engaged in, it shall endeavor to eliminate such practices by informal methods of conference, conciliation, and persuasion. Nothing said or done during such endeavors shall be disclosed by any member of the commission or its staff or be used as evidence in any subsequent proceeding. If, after such investigation and conference, the commission is satisfied that any unlawful discriminatory practice of the respondent will be eliminated, it may treat the complaint as conciliated, and entry of such disposition shall be made on the records of the commission. If the commission fails to effect the elimination of such unlawful discriminatory practices and to

obtain voluntary compliance with Chapter 4112. of the Revised Code, or, if the circumstances warrant, in advance of any such preliminary investigation or endeavors, and if, with respect to an alleged violation of division (H) of section 4112.02 of the Revised Code, the commission finds that complainant acted with intention of fulfilling any contracts or agreements he was seeking, the commission shall issue and cause to be served upon any person or respondent a complaint stating the charges in that respect and containing an notice of hearing before the commission, a member thereof, or a hearing examiner at a place therein fixed to be held not less than ten days after the service of such complaint. Such place of hearing shall be within the county where the alleged unlawful discriminatory practice has occurred or where the respondent resides or transacts business. The attorney general shall represent the commission at such hearing and present the evidence in support of the complaint. Any complaint issued pursuant to this section must be so issued within one year after the complainant files a charge with respect to alleged unlawful discriminatory practices.

(C) Any such complaint may be amended by the commission, or a member thereof, or its hearings examiner conducting the hearing, at any time prior to or during the hearing based thereon. The respondent has the right to file an answer or an amended answer to the original and amended complaint and to appear at such hearing in person, or by attorney, or otherwise to examine and cross-examine witnesses.

(D) The complainant shall be a party to the proceeding and any person who is an indispensable party to a complete determination or settlement of a question involved in a proceeding shall be joined. Any person who has or claims an interest in the subject of the hearing and in obtaining or preventing relief against the acts or practices complained of may be, in the discretion of the person or persons conducting the hearing, permitted to appear for the presentation of oral or written arguments.

(E) In any proceeding, the member, hearing examiner, or

commission shall not be bound by the rules of evidence prevailing in the courts of law or equity, but shall, in ascertaining the practices followed by the respondent, take into account all reliable, probative, and substantial evidence, statistical or otherwise, produced at the hearing, which may tend to prove the existence of a predetermined pattern of employment or membership, provided that nothing contained in this section shall be construed to authorize or require any person to observe the proportion which persons of any race, color, religion, sex, national origin, handicap, age, or ancestry bear to the total population or in accordance with any critterion other than the individual qualifications of the applicant.

(F) The testimony taken at the hearing shall be under oath and shall be reduced to writing and filed with the commission. Thereafter in its discretion, the commission upon notice to the complainant and to the respondent with an opportunity to be present may take further testimony or hear argument.

No person shall be compelled to be a witness against himself at any hearing before the commission or a hearing examiner of the commission.

(G) If upon all reliable, probative, and substantial evidence the commission determines that the respondent has engaged in, or is engaging in, any unlawful discriminatory practice, whether against the complainant or others, the commission shall state its findings of fact and conclusions of law, and shall issue and, subject to the provisions of Chapter 119. of the Revised Code, cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purposes of sections 4112.01 to 4112.08 of the Revised Code, including, but not limited to, hiring, reinstatement, or upgrading of employees with, or without, back pay, admission or restoration to union membership, including a requirement for reports of the manner of compliance. If the commission directs

payment of back pay, it shall make allowance for interim earnings. Upon the submission of such reports of compliance the commission may issue a declaratory order stating that the respondent has ceased to engage in unlawful discriminatory practices.

(H) If the commission finds that no probable cause exists for crediting the charges, or, if upon all the evidence, the commission finds that a respondent has not engaged in any unlawful discriminatory practice against the complainant or others, it shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. A copy of the order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper.

(I) Until a transcript of the record in a case is filed in a court as provided in section 4112.06 of the Revised Code, the commission may, subject to the provisions of Chapter 119. of the Revised Code, at any time, upon reasonable notice, and in such manner as it deems proper, modify or set aside in while or in part, any findings or other made by it.

4112.051 Actions in a Common Pleas Court

(A) The rights granted by division (H) of section 4112.02 of the Revised Code may be enforced by aggrieved private persons by filing civil actions in a court of common pleas. No person shall be compelled to be witness against himself. A civil action shall be commenced within one hundred eighty days after the alleged discriminatory housing practice occurred.

(B) If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

(C) Any sale, encumbrance, or rental consummated prior

to the issuance of any court order issued under the authority of this section, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of a charge by a complainant under division (H) of section 4112.02 of the Revised Code or a civil action under this section is not affected.

(D) Upon application by the plaintiff and in such circumstances as the court deems just, the court in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of costs.

(E) The court may grant such relief as it deems appropriate, including a permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages, together with the court costs.

(F) The court shall notify the Ohio Civil Rights Commission of any finding pertaining to discriminatory housing practices within fifteen days of the finding.

4112.06 Judicial Review

(A) Any complainant, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue a complaint, may obtain judicial review thereof and the commission may obtain an order of court for the enforcement of its final orders, in a proceeding as provided in this section. Such proceeding shall be brought in the common pleas court of the state within any county wherein the unlawful discriminatory practice which is the subject of the commission's order was committed or wherein any respondent required in the order to cease and desist from an unlawful discriminatory practice or to take affirmative action resides or transacts business.

(B) Such proceedings shall be initiated by the filing of a petition in court as provided in division (A) of this section and

the service of a copy of the said petition upon the commission and upon all parties who appeared before the commission. Thereupon the commission shall file with the court a transcript of the record upon the hearing before it. The transcript shall include all proceedings in the case, including all evidence and proffers of evidence. The court shall thereupon have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter, upon the record and such additional evidence as the court has admitted, an order enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the commission. The court shall require the posting of a sufficient bond before granting temporary relief or a restraining order in a case involving a violation of division (H) of section 4112.02 of the Revised Code.

(C) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

(D) The court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonably diligence have been ascertained prior to the hearing before the commission.

(E) The findings of the commission as to the facts shall be conclusive if supported by reliable, probative, and substantial evidence on the record and such additional evidence as the court has admitted considered as a whole.

(F) The jurisdiction of the court shall be exclusive and its judgment and order shall be final subject to appellate review. Violation of the court's order shall be punishable as contempt.

(G) The commission's copy of the testimony shall be available at all reasonable times to all parties without cost for

examination and for the purposes of judicial review of the order of the commission. The petition shall be heard on the transcript of the record without requirement of printing.

(H) If no proceeding to obtain judicial review is instituted by a complainant, or respondent within thirty days from the service of order of the commission pursuant to this section, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the commission's jurisdiction and resides or transacts business within the county in which the petition for enforcement is brought.

(I) All suits brought under this section shall be heard and determined as expeditiously as possible.

4112.061 Appeal from adverse court, judgment on questions of law and sufficiency of evidence

(A) The Ohio civil rights commission may at its discretion appeal from an adverse judgment rendered by a court. Such appeal shall proceed as in the case of appeals in civil actions as provided in sections 2502.01 to 2505.45, inclusive, of the Revised Code. Such appeal by the commission shall be taken on questions of law relating to the constitutionality, construction, or interpretation of the statutes and rules and regulations of the commission and in matters involving the correctness of the judgment of the court of common pleas that an order of the commission is not supported by reliable, probative, and substantial evidence. Such appeals may be taken regardless of the fact that a proceeding was pending prior to the enactment of this section expressly authorizing such appeals, provided such appeals are perfected by the filing of notice of appeal within the time provided by section 2505.07 of the Revised Code.

(B) Nothing in this section affects in any manner any provision in sections 4112.01 to 4112.08, inclusive, and section 4112.99 of the Revised Code relative to the rights of

any party, inclusive of the commission, to seek such other court action as is provided under such sections.

MISCELLANEOUS PROVISIONS

4112.07 Posting of Notice

Every person subject to division (A), (B), (C), (D), or (E) of section 4112.02 of the Revised Code, shall post in a conspicuous place or places on his premises a notice to be prepared or approved by the commission which shall set forth excerpts of this chapter and such other relevant information which the commission deems necessary to explain sections 4112.01 to 4112.07, inclusive, of the Revised Code.

4112.08 Construction

The provisions of sections 4112.01 to 4112.08 of the Revised Code, shall be construed liberally for the accomplishment of the purpose thereof and any law inconsistent with any provision hereof shall not apply. Nothing contained in sections 4112.01 to 4112.08 and 4112.99 of the Revised Code, shall be deemed to repeal any of the provisions of any law of this state relating to discrimination because of race, color, religion, sex, national origin, age, or ancestry; except that any person filing a charge under section 4112.05 of the Revised Code is, with respect to the practices complained of, thereby barred from instituting a civil action under section 4101.17 or division (N) of section 4112.02 of the Revised Code.

4112.09 Administration of Oaths, Taking Affidavits and Acknowledgments

The executive director, compliance officer, each field investigator, and each regional director of the Ohio civil rights commission, with respect to matters relating to his official duties, may administer oaths, take affidavits, and acknowledgments, and attest the execution of any instrument in writing. The director shall file in the office of the secretary

of state the name and residence address of the occupant of each of the offices listed in this section and shall cancel such filing and make a new filing in a single document whenever the occupant of any such office changes.

The secretary of state shall record and index the filings required under this section and the filings shall be open to public inspection.

4112.10 Attorney General and Commission Litigation

The Attorney General shall conduct all litigation in which the Ohio civil rights commission participates as a party pursuant to Chapter 4112. of the Revised Code.

4112.11 Compliance with Commission Orders for Evidence

(A) No person shall willfully fail or neglect to attend and testify or answer any lawful inquiry or produce records, documents or other evidence, if in his power to do so, in obedience to a subpoena or lawful order of the Ohio civil rights commission.

(B) No person shall with intent to mislead the Commission, make or cause to be made any false entry or statement of fact in any report, account, record, or other documents submitted to the Commission pursuant to its subpoena or other order. No person shall willfully neglect or fail to make or cause to be made full, true, and correct entries in such reports, accounts, records, or other documents submitted to the Commission.

4112.99 Penalties

Whoever violates divisions (A) to (H) of section 4112.02, or sections 4112.07 or 4112.11 of the Revised Code is guilty of a misdemeanor of the third degree.

[Revised 7-26-84]

MOTION

Supreme Court, U.S.
FILED
OCT 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

Case No. 85-488

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal From the United States
Court of Appeals for the Sixth Circuit

MOTION TO DISMISS OR AFFIRM

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does the assertion of jurisdiction by the Ohio Civil Rights Commission over a church school which had dismissed, on grounds of religious misconduct, a teacher who had been employed to carry out its religious mission to children, violate rights of the church protected by the First Amendment's Free Exercise Clause and Establishment Clause?

2. Is Section 4112.02 of the Ohio Civil Rights Act void for vagueness and overbreadth?

LIST OF PARTIES

The list of parties as set forth in the Jurisdictional Statement is correct. In accordance with Rule 28.1, appellees state that Dayton Christian Schools, Inc., is a corporation which has no parent companies, subsidiaries, or affiliates.

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DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal From the United States
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MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Sixth Circuit on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not require further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."

U.S. Constitution, Amendment XIV:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law; . . ."

Ohio Civil Rights Act, Ohio Revised Code:

Section 4112.01 *et seq.* (Reprinted in Appendix to Jurisdictional Statement, A-132)

COUNTERSTATEMENT OF THE CASE

Dayton Christian Schools, Inc. ("DCS"), founded by appellees Patterson Park Church and Christian Tabernacle, operates, as an integral part of its religious mission, three schools whose religious purposes and religious orientation were found by the trial court to "permeate the School's goals, curriculum and administration . . ." *Dayton Christian Schools v. Ohio Civil Rights Commission*, 578 F.Supp. 1004,1010 (S.D. Ohio 1984). Mrs. Linda Hoskinson entered a contract of employment to teach in the schools, subscribing to the DCS Statement of Faith and Educational Philosophy Statement and being hired on the basis of her commitment thereto. These required, *inter alia*, on the basis of stated Scriptural reasons (in Matthew 18:15-17 and Galatians 6:1), the internal peaceful resolution of differences. It was therefore provided in teachers' contracts that teachers having differences with the schools would pursue internal procedures for resolving of these (through a "Biblical chain of command"), obey those in authority, and not

take a brother Christian to law. *Id.* at 1011. Mrs. Hoskinson also expressed a specific and affirmative commitment to this tenet of faith in other written communications to DCS. *Id.* at 1012. By observing this Scripturally prescribed process, the Schools, and all persons involved therein, are considered to discharge a duty of obedience to God. *Ibid.* Because her teaching contract was not renewed, due solely to DCS's belief that mothers of pre-school infants bear a Scriptural responsibility to provide nurture and care for them at home, Mrs. Hoskinson breached her contractual agreement and the religiously based "Biblical chain of command" policy by going to a lawyer outside DCS, who threatened legal action against the Schools. DCS, for that reason, terminated her employment, and she then filed a charge of sex discrimination with the Ohio Civil Rights Commission ("Commission" or "OCRC").

Thereafter, on April 18, 1979, the Commission opened a formal investigation, and, in pursuit thereof, requested from the Schools: employment data from 1977 forward on a state form; blank employment applications; employee handbook and rules and regulations, from 1977 forward; job descriptions and model contracts; information about employee programs; School Board minutes; and complete personnel files on more than a dozen employees. Also sought at that time were written policies and procedures, from 1977 forward, involving: disciplinary actions, up to and including discharge; employee pregnancies; oral and written performance evaluations; performance standards; employees working with pre-school children; contract renewal; employee grievance procedures; employees resorting to the legal system in grievances; determination of "serious philosophical differences"; inquiries into employees' financial status and babysitting plans. *Id.* at 1014.

On January 28, 1980, the Commission made a determination that DCS had probably engaged in unlawful discrimination, and concluded that Mrs. Hoskinson's

discharge was directly linked to DCS's policy respecting the duties of mothers to stay at home with their pre-school children. The Commission presented DCS with a Conciliation Agreement and Consent Order which it suggested DCS sign. This agreement included, *inter alia*, a requirement that DCS not seek information concerning a prospective employee's religion, or hire on the basis of religion, unless the Commission had certified in advance that religion was a bona fide occupational qualification for employment. *Id.* at 1015. On April 18, 1980, the Commission issued a complaint against DCS. DCS answered this by asserting that the Commission lacked jurisdiction due to the religious basis of the discharge.

On October 1, 1980, the appellees brought this action seeking (a) a declaratory judgment that enforcement of the Ohio Civil Rights Act against DCS violated its rights under the Religion Clauses of the First Amendment, and under the Ninth and Fourteenth Amendments and (b) an injunction to enjoin interference by the State with the plaintiffs' Free Exercise rights. On January 6, 1984 (three years after the trial had been concluded), the District Court entered its judgment denying the requested relief. The District Court opinion reviewed the powers extended to the Commission under the Ohio Civil Rights Act against a backdrop which it described as follows:

> ". . . [T]he pervasively religious environment of DCS must be kept in mind. Every aspect of the school's operation is geared toward exposing and educating the students on how to lead a Christian life by understanding what the members consider to be the guidance and direction provided by the Bible. . . . Because of the emphasis placed on the religious education of the students, the school demands that teachers conform both in thought and conduct to the tenets and principles felt essential to

> leading a Christian life. The belief system espoused by the members of DCS touches every aspect of their life: work, interpersonal relationships, family and recreational activities. Deviation in any way from what is felt to be the proper religious way of life may cast doubt on a teacher's ability to perform his or her critical role and may, therefore, be grounds for dismissal."

578 F.Supp. at 1018-1019. After cataloguing various provisions of §4112.02 of the Ohio Civil Rights Act which prohibit employers to inquire into, or hire on the basis of, *inter alia*, religion (violation of any of which is a misdemeanor of the third degree), the Court summarized the effects of the statute:

> "Applying the above cited statutory prohibitions to DCS, the Court finds that those provisions would appear to make it an unlawful discriminatory employment practice for DCS to make a decision to employ a "Born Again" Christian as opposed to someone, for example, adhering to Catholic or Jewish beliefs, assuming such individuals shared equal teaching abilities. Furthermore, the statute would appear to require DCS to get advance approval from the Commission that religion was a "bona fide occupational qualification" before they could question job applicants about their religious beliefs, keep records concerning applicants' religious beliefs, use forms eliciting information about religious beliefs, advertise for teachers holding particular religious beliefs, adopt a policy of hiring only adherents to fundamentalist principles, or accept applicants through any religiously oriented body that recommended only those holding fundamentalist beliefs.

> "A review of the record in this case makes it clear that if these statutory prohibitions were brought to bear on DCS. the School could be found to be violating each and every limitation."

Id. at 1020. The District Court also pointed to conflicts which arise from application of additional provisions of the Ohio Civil Rights Act, and which would involve the Commission in its own evaluation of a religious institution's subjective religious evaluations whereby

> ". . . the Commission could be cast in the role of dictating to the school administration which of its beliefs its members may enforce and, in the alternative, which doctrinal violations they must tolerate and live with."

Id. at 1021-1022.

The District Court found this potential for intrusion into the religious domain of DCS to be accentuated by the provisions of the Act which relate to investigation, compulsion of testimony, and compelled production of records and documents. *Id*. at 1022. The Court then went on to state:

> "Within this procedural framework exists the potential for the Commission to evaluate sectarian decisions, in the context of hearings and investigations, to prohibit adherence to, or at least actions based upon religious tenets, and, in fact, to require the posting of antidiscrimination statements that may run contrary to the members' religious beliefs. In a school which attempts to permeate every lesson and activity with its religious principles and values, such potential intrusion by the state squarely presents a risk of impermissible state entanglement and interference with members' religious beliefs and practices."

Id. at 1022-1023. The District Court likened the potential risks to religious practice posed by the Ohio Civil Rights Act to the situation presented to the United States Supreme Court in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979);

> "[t]he resolution of . . . charges . . . , in many instances, will necessarily involve inquiry into the good faith position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the religion clauses, but also the very process of inquiry leading to findings and conclusions." [Citing *NLRB v. Catholic Bishop*, 440 U.S. at 502].

Id. at 1023.

Despite having so stated and analyzed the Ohio legislative prescriptions and prohibitions at issue, the District Court concluded that extension of Commission jurisdiction in the premises would not severely burden the exercise of religious beliefs by DCS. *Id*. at 1033-1034. The Court also found that the burden which would be imposed by Commission jurisdiction would be justified by a compelling state interest in eliminating employment discrimination. *Ibid*. The Court discounted the claims of DCS that the Act contained certain vague and overbroad provisions (*id*. at 1026-1027), and would result in excessive entanglement between government and religion. (*Id*. at 1037-1039).

After a notice of appeal had been lodged with the United States Court of Appeals for the Sixth Circuit, the District Court, on July 30, 1984, issued an injunction, pending appeal, prohibiting the Commission from exerting jursidiction in the instant case. *Dayton Christian Schools v. Ohio Civil Rights Commission*, 604 F.Supp. 101 (S.D. Ohio, 1984). In so doing, the District Court found that DCS, its sponsoring churches, its faculty and

its administrator, would "suffer irreparable harm" absent an injunction pending appeal, due to the permanent loss of their First Amendment rights interim. *Id.* at 104.

On June 26, 1985, a three-judge panel of the United States Court of Appeals for the Sixth Circuit unanimously reversed the judgment of the District Court. *Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985). Setting forth the record evidence at some length, the Court of Appeals affirmed the District Court's factual conclusion that:

> "DCS is a pervasively religious institution in which religious considerations permeate all aspects of the educational process, govern the teacher selection process, and dictate parents' entrustment of their children's education to the School."

Id. at 938. It also upheld the District Court's determinations that the decisions with respect to the employment of Mrs. Hoskinson were compelled by sincere religious belief. *Id.* at 938-940.

Addressing the issues raised under the Religion Clauses of the First Amendment, the Court of Appeals concluded that the affixing of jurisdiction by the Commission in this case would breach both the Free Exercise and Establishment Clauses of the First Amendment. The Court cited the traditional protections accorded parental rights in family nurture and education, and found the "fundamental" rights of the plaintiff parents to be "foremost" among the factors compelling a conclusion that a severe burden would be placed on the exercise of religious beliefs by the parents and schools should the Commission be allowed to regulate the employment practices of a pervasively religious school. *Id.* at 947-949. It drew the following comparison to the burdens on religious practice considered in *Wisconsin v. Yoder*, 406 U.S. 205 (1972):

> "The claims of the Amish parents in *Yoder* are similar in kind to those of appellants in that the Amish parents objected to the values to which their children would be exposed in public high school, in the same way that appellants object to the state's attempt to regulate DCS hiring practices with the result of coercing the school into retaining or hiring teachers whose lifestyles and actions conflict with the parents' basic religious beliefs.
>
> "The tender ages of the children exposed to Linda Hoskinson likewise compels the conclusion that the state interference with DCS selection of religious role models constitutes a substantial burden on religious freedom."

Id. at 948.

The Court's examination of the Ohio Civil Rights Act and the consequences of affixing of Commission jurisdiction thereunder led it to characterize the challenged practices as "highly coercive". *Id.* at 949-952. In this respect it pointed to several "coercive tools" employed by the Commission to "compel appellants to relinquish the mandates of their consciences." *Id.* at 951. The Court made particular note of the provisions of the Consent Order acceptance of which the Commission had "attempted to coerce DCS into". *Ibid.* One of the provisions of that Order had stipulated that:

> "The Commission may conduct such compliance reviews during Respondent's normal business hours as the Commission believes to be warranted during the three (3) years subsequent to the issuance of this PROPOSED ORDER. Respondent agrees to furnish whatever infomation is required by the Commission in order to implement such reviews, and understands that upon failure to fully comply with any of

> the items and conditions of this PROPOSED ORDER the Commission may initiate further action including, but not necessarily limited to, the filing of a complaint for enforcement of this ORDER in an appropriate court of common pleas."

Ibid. Finding that the exercise of jurisdiction by the Commission would be burdensome on all parties bringing the action, the Court spelled out what it believed to be a key result of the exercise of Commission jurisdiction in this case:

> "[T]he congregations and parents are faced essentially with either supporting a school staffed by faculty who flout basic tenets of their religion or abandoning their support of Christian education altogether. The burden on the parents' exercise of religion is particularly onerous in light of the heightened parental interest in their children's education."

Id. at 952. Agreeing with the claims of the schools, churches, faculty and parents, the Court found that these persons:

> "[O]nly have the option of either conforming their religiously based employment practices to the secular guidelines promulgated in the Ohio statute or face continued harassing prosecution by the OCRC. . . . Accordingly, we conclude that the OCRC's exercise of jurisdiction over the complaint of DCS affirmatively and coercively burdens appellants' exercise of their religious beliefs and their attempts to instill such in their offspring."

Ibid.

While the Court found that the State's professed interest in enactment of the Ohio Civil Rights Act was "substantial", it held that interest "does not justify such a broad and onerous limitation" on the exercise of the

plaintiffs' religious beliefs. *Id.* at 954. Moreover, the Court found that the State's interest in eradicating discrimination would not be significantly interfered with by accommodation of the religious beliefs in this case, and that less burdensome alternatives were available to the State in pursuit of its interests. *Id.* at 955.

Turning to the question of whether the exercise of jurisdiction by the Commission would create an impermissible risk of excessive governmental entanglement in the affairs of church-operated schools, the Court examined three particular matters: the pervasively religious nature of the institution involved; the pervasively religious nature of the activity being burdened (the teaching of students and hiring of teachers); and the interjection by the State into the hiring decision, a decision resting almost exclusively on religious criteria. *Id.* at 957-961. As a result, the Court found that the exertion of OCRC jurisdiction created a "continuing relationship" in which the Commission would exercise a "comprehensive, discriminating, and continuing state surveillance." *Id.* at 958-959. This relationship would, the Court found, often require the Commission to decide questions of intent, motive, causation, and pretext, thus necessarily involving the State in assessing religious decisions. *Id.* at 959. The Court relied upon the District Court's factual findings respecting the nature and operation of the Commission under the Ohio Civil Rights Act, but refused to adopt the District Court's position that the state/church entanglements should be discounted because only a hearing was immediately impending at the point this action was filed. *Id.* at 960-961.

> "[T]he OCRC's aggressive pursuit of DCS raises a 'realistic likelihood' . . . that not only are the impermissible entanglements of the hearing itself implicated, but, rather, the entire panoply of statutory

> entanglements from the proposed consent order to the specter of judicial enforcement proceedings must be considered."

Id. at 961. The Court found this entanglement to operate to "discourage the practice of religious belief". *Ibid.*

Pursuant to its opinion, the Court of Appeals reversed the judgment of the District Court, and directed issuance of an injunction in accordance with its own opinion. Thereafter, this appeal ensued.

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUES PRESENTED ON THIS APPEAL

The appellants seek plenary review partly for the reason that the Court of Appeals' decision herein "creates an irreconcilable difference of opinion between the federal courts of appeal on this issue".[1] Jurisdictional Statement, 24. This claim of conflict is without basis. In support of its contention appellants cite decisions of but two circuits, *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982) and *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981). The decision of the Court of Appeals in the present case conflicts with neither.

Pacific Press is not in point. Appellants, at Pages 12-13 of their Jurisdictional Statement, say that *Pacific Press* holds that "the compelling public interest in eradicating sex discrimination . . . was sufficient to override the assertion that the pervasively religious nature of an employer's activities or the exercise of its religious beliefs immunizes its employment decisions from agency

1. Appellants also say that conflict between the opinions of the District Court and the Court of Appeals "underscores the need for this Court's [the Supreme Court's] plenary consideration". Jurisdictional Statement, 19-20. Such overrulings of district court opinions are common to most federal court appeals and afford no justification for plenary consideration.

enforcement"; further, that "permitting enforcement of Title VII against religiously affiliated employers did not constitute an impermissible entanglement with religion . . ." Appellants, further, state that in *Pacific Press*, "as in this case, the dismissal of the employee was based upon the violation of a "church doctrine prohibiting lawsuits by members against the church". Jurisdictional Statement, 13. The analogy is wide of the mark.

Pacific Press involved a church-affiliated publishing house (*Pacific Press, supra* at 1274), which was controlled, not by the church but by its own board (*id.* at 1275); whose discriminatory practice complained of was not rooted in doctrine (*id.* at 1279). The duties of the complaining female employee in *Pacific Press* did not go to the heart of the church's functions (*id.* at 1278). The present case involves a church-founded school, whose sole mission is "for the propagation of the Christian beliefs and faith", this being "an integral part of the school's philosophy and operation". *Dayton Christian Schools v. Ohio Civil Rights Commission*, 578 F.Supp. 1004, 1010 (S.D.Ohio 1984). Dayton Christian Schools' "Biblical chain of command" policy, as well as its infant care policy, are rooted solely in doctrine. *Id.* at 1010-1012. The function of the complaining employee in the present case — that of teacher of the children of a religious school under a contractual obligation requiring strict religious fidelity even in personal conduct on or off campus (*id.* at 1019) — is at the very core of the mission of the religious school. *Lemon v. Kurtzman*, 403 U.S. 602, 618-619 (1971); *Meek v. Pittenger*, 421 U.S. 349, 369 (1975); *NLRB v. Catholic Bishop of Chicago, supra* at 504. *Pacific Press* itself fully confirmed the constitutionally unique role of the teacher in a religious school. *Pacific Press, supra* at 1278.

In the present case, the Sixth Circuit cited *Pacific Press* for the latter's teaching on retaliation (*Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission*, 766 F.2d 932, 954 (6th Cir. 1985)), distinguished the

case on its facts (*id.* at 942, n. 18), and in no way criticized it. So with *EEOC v. Mississippi College, supra*. As to that case, the appellants state that the Fifth Circuit therein concluded,

> ". . . contrary to the Sixth Circuit's decision in this case, the fact '[t]hat faculty members are expected to serve as examples of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern,' requiring constitutional exception from governmental regulation."

Jurisdictional Statement, 13. Northing in the Court of Appeals' opinion in the present case contradicts that or questions that. The case is, however, plainly distinguishable. In *Mississippi College*, the Fifth Circuit held that Title VII is *not* applicable where the alleged sex discrimination is on the basis of religion:

> "We conclude that if a religious institution of the kind described in §702 [protecting the right of religious educational institutions to employ individuals of a particular faith to carry out the institution's work] presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, §702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."

Mississippi College, supra at 484. Further, *Mississippi College* held Title VII not to be applicable to the employment relationship between a church and those of its employees who "instruct students in the whole of religious doctrine". *Id.* at 485. The Dayton Christian Schools, integrally related to plaintiff Patterson Park Church and Christian Tabernacle, were founded as "an integral part

of the religious mission" of those churches. *Lemon v. Kurtzman, supra* at 616. Mrs. Hoskinson was employed to "instruct children in the whole of religious doctrine".

The claim of a conflict among the circuits is spurious. There appears instead to be concord among the circuits in respect to the chief constitutional issues here presented.

II. THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

The Court of Appeals adopted long-established constitutional principles in its analysis of the appellants' claims and of the Free Exercise and Establishment Clause issues raised by the appellees.[2] Further the Court carefully followed the teachings of the Supreme Court respecting compelling governmental interest in eradicating all forms of discrimination. The Court fully acknowledged that "[t]he state, in pursuit of a compelling interest, may burden religious practices". *Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission*, 766 F.2d at 952. The Court accordingly declined to treat religious freedom interests as automatically outweighing nondiscrimination interests. Nor did it do the opposite. Instead, it followed the teaching of the Supreme Court that it weigh the competing interests. *Wisconsin v. Yoder, supra* at 218. Those competing interests are misstated by appellants when they say that the Court of Appeals has held that any "religiously affiliated school is immune from the application of Ohio's laws prohibiting sex discrimination as such laws relate to employment decisions which implicate religious beliefs". Jurisdictional Statement, 10-11, The Court of Appeals did not so hold. Involved here were not merely "religiously affiliated"

2. The Court of Appeals did not address the issues of statutory vagueness and overbreadth raised by appellees, in view of its resolution of the Religion Clause issues.

schools, but schools at the core of the churches' mission. Nor were employment decisions involved which merely "implicate" religious beliefs. Involved instead was the placing of fundamental, religiously rooted practices under the unlimited jurisdiction of a state agency. The decision of the Court of Appeals barring that, in this case, where an employee deliberately spurned the legal obligations of an employment to which she had voluntarily subscribed, scarely amounts to a decision of "monumental import". Jurisdictional Statement, 11. The Court of Appeals, in its decision, did nothing more than pursue precedent principles expressed by the Supreme Court and articulated nothing innovative.

The case cited by appellants in support of their plea that the question they raise is so substantial as to require Supreme Court plenary review (Jurisdictional Statement, 11-15) are simply not in point. While it is true that *Roberts v. United States Jaycees*, 468 U.S. ____, 104 S.Ct. 3244 (1984), *Mathews v. Lucas*, 427 U.S 495 (1976), *Cleveland v. LaFleur*, 414 U.S. 632 (1974), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), involved "elimination of sex discrimination" and "freedom of choice in matters of family life" (Jurisdictional Statement, 11), the decision of the Court of Appeals here in no way confronts those holdings; indeed, it in no way involves them. *Bob Jones University v. United States*, 461 U.S. 574 (1983), cited as authority by appellants (Jurisdictional Statement, 11)[3] turned upon the issue of governmental financial support of an institution held by the Supreme Court to have a governing policy of racial discrimination. To compare, as do appellants, the state interests involved in *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Reynolds v. United States*, 98 U.S. 145 (1878) and *United States v. Lee*, 455 U.S. 252 (1982)

3. But at Page 19 appellants state: "The facts in this case are entirely distinguishable from those in *Bob Jones University* . . ." Jurisdictional Statement, 19.

with what state interests may be involved in the present case is not possible, since the factual disparity between all of those cases and the present case is great. As has been seen, *Pacific Press* and *Mississippi College* are in point only insofar as they are supportive of the reasoning of the Court of Appeals herein.

In their discussion of the Court of Appeals' analysis of the Free Exercise issues, appellants' appear to contend that if the burden upon the appellees' religious practice would not be identical to that found in *Wisconsin v. Yoder*, then that burden is not constitutionally significant. The Supreme Court has never so held. Rather it has recognized that the burdens which the Free Exercise Clause forbids may be various in kind and magnitude, with importance being attached to the perception of burden in the eye of the religious claimant. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707, 716 (1981). The opinion herein of the Court of Appeals treats in detail both the nature and magnitude of the burden on Free Exercise which the record well establishes (766 F.2d at 947-954). Appellants, resting solely upon citations to different cases with different facts, avoid discussion of those injuries to parental religious rights and to the religious ministry which the Court of Appeals specified in such detail.

In their discussion of the state's interest, appellants seek to persuade the Court that its declining to grant plenary review here will open the door wide to paralysis in the legal eradication of sex discrimination wherever a religious objection to an anti-discrimination statute is voiced. This case involves no such potential, and its facts will not be readily duplicated. As the Court of Appeals correctly points out, "[s]tate employment discrimination laws enacted after the passage of the Civil Rights Act of 1964, unlike the Ohio statute (effective July 29, 1959), generally include an exemption for religious discrimination by religious institutions". *Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission*, 766 F.2d at 941 n.

18. "Religious discrimination by religious institutions" is all that is involved in this case, the "discrimination" amounting to dismissal of a teacher, in a church-school, who had voluntarily, contractually and ethically bound herself to observe the doctrines of that school and who then flouted her own commitment. That is this record and this case; the appellants' attempt to broaden this case into a case of national scope is baseless. Appellants choose, however, to ignore another aspect of this case: namely, the real hazard to the liberties of religious educational institutions and parental religious rights were it to be held that, under the facts in this record, a party situated similarly to appellants could prevail.

In respect to the issue of entanglement under the Establishment Clause, the appellants again argue for plenary review based upon a "wide divergence of opinion" *between the District Court and the Court of Appeals*. Jurisdictional Statement, 19. While, as seen, such a divergence is immaterial in terms of whether the Supreme Court should grant full review, the substance of appellants' entanglement argument likewise provides no basis for such review. Principally, it is appellants' position that the excessive entanglements identified by the Court of Appeals are merely potential and speculative. The Court of Appeals' rejection of this contention falls squarely in line with the prior decisions of the Supreme Court respecting entanglements. As had long ago been said, the *potential* for excessive entanglement may be sufficient to invalidate governmental action. *Public Funds For Public Schools v. Marburger*, 358 F.Supp. 29 (D.N.J. 1973), *aff'd.*, 417 U.S. 961 (1974). In one of this Court's earliest specific warnings against excessive state-church entanglements, it spoke of " 'programs, whose very nature is *apt* to entangle the state in details of administration'." *Lemon v. Kurtzman, supra* at 615. (Emphasis supplied). The Court of Appeals herein has sedulously followed the teaching of the Supreme Court in *Catholic Bishop, supra*. There the latter court, while it

did not rule on the Religion Clause issues raised by the religious claimant, found that imposition of NLRB jurisdiction upon religious schools presented "a significant risk that the First Amendment will be infringed" (*id.* at 502) not only because of a threatened intrusion upon church liberties by the labor board but because of the entailed "very process of inquiry leading to findings and conclusions". *Ibid.* Courts of appeals other than the Sixth Circuit have shown that their understanding of the Supreme Court's teaching on church-state separation is similar to that of the Sixth Circuit in the present case. See *Surinach v. Pesquera des Busquets*, 604 F.2d 73, 76 (1st Cir. 1979) (a court, in cases involving government regulation of religious schools, "will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems." [citing *Catholic Bishop*]); *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 822 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 284 (1981); *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1124 (7th Cir. 1977), *aff'd. on other grounds*, 440 U.S. 490 (1979); *EEOC v. Pacific Press Publishing Association, supra* at 1282.

CONCLUSION

Appellants thus bring to the Court an appeal concerning which no conflicts within the circuits exist and upon which the Court of Appeals has ruled consistently with Supreme Court precedents. The Jurisdictional Statement thus presents no substantial federal question warranting plenary review. For the foregoing reasons this appeal should be dismissed or, in the alternative, the decision below should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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CASE NO. 85-488

NOV 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., et al.,
Appellees.

ON APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPELLANTS' REPLY BRIEF

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CASE NO. 85–488

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., et al.,
Appellees.

APPELLANTS' REPLY BRIEF

THE QUESTION PRESENTED IS SUBSTANTIAL

Never before has this Court resolved a direct conflict between equal employment rights and the right of religious freedom. Dayton Christian Schools, Inc. freely admits Linda Hoskinson was dismissed from her school teacher's position because of her pregnancy and because she attempted to exercise her statutorily protected right to redress what she believed to be illegal discrimination. Appellees claim, however, their action against Mrs. Hoskinson was justified by religious doctrine and is beyond the reach of anti-discrimination statutes. The issue presented by this case is whether sexually discriminatory and retaliatory actions taken by a religiously affiliated institution, established to provide secular education, are exempt from equal employment laws because those actions are grounded in religious doctrine.

Appellees contend this Court has previously decided this question yet they cannot cite a single case in which this issue is addressed.

Appellees argue there is not a substantial question to consider here because the proper tests were applied by the courts below. Such position ignores the reality that it is the application of those tests to a set of facts that develops law. It is in the application of the tests that the court is required to balance interests and determine which competing right ultimately prevails. This proposition is manifest in the totally contrary conclusions reached by the district court and the court of appeals. The need for plenary review is not limited to the rare instance in which the lower courts utilize wrong tests. Plenary review is equally compelling when there is a substantial question as to whether the lower court reached the right result, and is especially important when the court has declared a state statute unconstitutional.

Appellees' contention that the Sixth Circuit's decision did nothing more than "pursue precedent principles" by applying the proper tests ignores the wide reaching effects of this decision. The courts have scrupulously followed this Court's recognition of the constitutional mandate to avoid involvement in church-minister relationships. *Gonzalez v. Archbishop,* 280 U.S. 1 (1929); *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976). Prior to the Sixth Circuit's decision, however, no court had deprived employees in religiously affiliated institutions of the protection of anti-discrimination laws. In fact, every court that had considered the applicability of the federal equal employment law to religious employers had concluded that Congress intended to prohibit religious organizations from discriminating among employees on the basis of race, sex or national origin. *EEOC v. Pacific Press Publishing Associa-*

tion, 676 F.2d 1272, 1277 (9th Cir. 1982). The Sixth Circuit's decision expands the historical church-minister immunity to encompass lay teachers in religious schools. Linda Hoskinson was not hired to teach religion. Linda Hoskinson was hired to teach secular subjects in a religious atmosphere. Yet the appellate court finds this relationship exempt from enforcement of equal employment law. The appellate court reasons that, as a teacher, Linda Hoskinson is expected to act as a role model for the school children and, therefore, her relationship with the school is akin to that of a church and its ministers. (A-27). This reasoning is patently contrary to the Fifth Circuit's decision in *EEOC v. Mississippi College,* 626 F.2d 477 (1980). The court concluded in that case that the fact "[t]hat faculty members are expected to serve as examples of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern," requiring constitutional exception from government regulation. *Id.,* 626 F.2d at 485.

In expanding the historical church-minister immunity, the Sixth Circuit's decision ignores this Court's holding that religious beliefs do not grant an unbridled right to act on those beliefs. *United States v. Lee,* 455 U.S. 252 (1982). Despite enforcement of Ohio's laws against discrimination, all persons affiliated with Dayton Christian Schools will be free to believe that women with pre-school age children should not work and to believe that resort to courts is improper. Having involved itself in a secular endeavor, however, the school can no longer claim an absolute protected right to take adverse employment action against its employees based on its religious beliefs.

Appellees contend the Sixth Circuit decision articulates nothing innovative in this area of law. This position ignores the profound ramifications the appellate court's decision holds for enforcement of equal employment laws. The decision immunizes illegal discriminatory actions based on race, sex or national origin from judicial scrutiny if the religious institution professes to believe that religion justifies the discrimination. Acceptance of the Sixth Circuit's reasoning in this case requires acquiesence in the proposition that eradication of sex discrimination is less compelling than the eradication of race discrimination, *Bob Jones University v. United States,* 461 U.S. 574 (1983), is less compelling than mandatory participation in the social security system, *United States v. Lee,* is less compelling than enforcement of child labor laws, *Prince v. Massachusetts,* 321 U.S. 158 (1944), and is less compelling than the prohibition against polygamy, *Reynolds v. United States,* 98 U.S. 145 (1878). The Sixth Circuit gives lip service to the principle that the interest in eradicating sex discrimination is compelling. It nevertheless extends to Dayton Christian Schools, Inc. the privilege to act in a discriminatory manner. In so doing, the Sixth Circuit declares the state's interest in eradication of sex discrimination to be of less importance than those interests recognized by this Court in the cases cited above. Its declaration directly conflicts with this Court's recent pronouncement in *Roberts v. United States,* 468 U.S. _____ , 104 S. Ct. 3244, 3254 (1984) that the "stigmatizing injury, and the denial of equal opportunities that accompanies it" is as serious when the discrimination is based on sex as when it is based on race.

The lower court's subversion of the state's compelling interest in eradicating sex discrimination is particularly egregious because it resulted from pure speculation about the possible entanglement involved in application of the Ohio laws against discrimination to the School. The court engaged in hypothetical questions when it found the Commission "may" exercise jurisdiction over employment disputes thereby creating a continuing relationship rather than a one-time state-church encounter. (A-44). The court was forced to resort to speculation because there was no tangible injury facing the School. Appellees continue to claim the Commission's proposed conciliation agreement represents real harm to the School. The argument is groundless since the conciliation agreement is a mere proposal employed to initiate voluntary settlement discussions. The School was completely free to reject the Commission's proposed conciliation agreement. Furthermore, even if the Commission holds its hearing, the remedy is discretionary. Ohio law would not require that Linda Hoskinson be reinstated to her position as a teacher at Dayton Christian Schools, Inc. The Commission could award front pay in lieu of reinstatement. *Fitzgerald v. Sirloin Stockade, Inc.,* 624 F.2d 945, 957 (10th Cir. 1980). The lower court's examination of the "entire panoply of statutory entanglements" that could have occurred was premature, given the discretionary nature of the remedy, the possible alternative remedies to be awarded, and certainly the possibility that the Commission could find for the School.

Appellees assert *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979) as precedent on the entanglement issue. That case's precedential value is limited to the support it gives Appellants' position that the constitutional questions raised are indeed substantial

because this Court never resolved the merits of the constitutional questions presented. In any event, the facts in the instant matter are not analogous to *Catholic Bishop*. There is no evidence in the record to indicate the Commission would have any continued involvement in employment decisions at the School.

THERE IS A CONFLICT AMONG THE CIRCUITS

Appellees mislead the Court by asserting there is no conflict among the circuit courts regarding the issues presented in the pending case. Appellees first argue *Pacific Press* is factually distinguishable because it involved a church-affiliated publishing house which was controlled by a board of directors. Dayton Christian Schools, Inc. also is a church-affiliated corporation which is governed by a board of directors. The board consists of twelve members, all of whom must be exemplary Christians, but only two members need be members of Patterson Park Church and the Christian Tabernacle. In fact, no more than three members of the Board may be from one church. (Constitution of Dayton Christian Schools, Article III). Contrary to Appellees' contention that the sole mission of the School is for the propagation of Christian beliefs and faith, "[t]he principal purpose of the Dayton Christian Schools, Inc. is to provide a program of education in a positive Christian atmosphere offering regular courses of study, in compliance with the laws and regulations of the State of Ohio and the State Board of Education." (Constitution of Dayton Christian Schools, Article II, Section 1). Dayton Christian Schools, Inc. is, as its title bespeaks, a school not a church, and Linda Hoskinson was a teacher in that school and not a minister of the church.

Appellees also mislead the Court in their discussion of the *Pacific Press* case by incorrectly stating it did not involve a discriminatory practice rooted in religious doctrine. The case involved two issues. In *Pacific Press*, an employee of the religious publishing house filed a charge of discrimination alleging an equal pay violation. Upon the filing of her charges and initiation of legal proceedings, Pacific Press terminated the employee because she violated church doctrine which prohibits lawsuits by church members. While the Ninth Circuit found no conflict between religious doctrine and the equal pay law, it did find a direct conflict between church doctrine forbidding lawsuits by members against the the church and federal laws against retaliation. The Ninth Circuit found:

> Unlike the wage discrimination issue, there is a substantial impact on the exercise of religious beliefs because EEOC's jurisdiction to prosecute the retaliatory action taken against Tobler potentially will impose liability on Press for disciplinary action *based on religious doctrine*. We find, however, that the government's compelling interest in assuring equal employment opportunities justifies this burden.

676 F.2d at 1280. (Emphasis added). Appellees' contention that no religious doctrine was involved in the *Pacific Press* case is obviously wrong. A direct conflict between religious doctrine and anti-discrimination law existed in that case and was resolved against the institution.

The Sixth Circuit attempted to distinguish *Pacific Press,* but that distinction completely misses the mark. The appellate court distinguished *Pacific Press* on the wage issue only and never addressed the retaliation issue which is directly on point with the pending case. Furthermore, the Sixth Circuit relied on the lack of a religious exemption in the Ohio law to draw a meaningless distinction between the instant case and *Pacific Press.* By the court's own admission, 42 U.S.C. Section 2000e-1 exempts religious institutions for religious discrimination alone and does not exempt other types of discriminatory action. Obviously, therefore, the absence of a parallel exemption in the Ohio law is meaningless in a case where the discrimination is based on sex, a non-exempt form of discrimination. The Fifth Circuit in *Mississippi College* likewise found Title VII's exemption for religious institutions to apply only to cases alleging purely religious discrimination. The court ruled that despite the religious exemption, the EEOC retains jurisdiction to pursue allegations of discrimination based upon sex or race against religious institutions. *Mississippi College,* 626 F.2d at 485.

Despite Appellees' contention, religious discrimination by a religious institution is not what is involved in the present case. Linda Hoskinson's charge alleges sex discrimination and retaliation. Appellees justify such practices by citing to religious doctrine. The case presents a direct collision between the state's compelling interest in eradication of discrimination and Appellees' claim of religious freedom. In considering this issue, the Ninth Circuit and the Sixth Circuit have reached totally contrary conclusions in applying the law. The substantial issues presented in the pending case and the conflicting resolution by the circuit courts demand the attention of this Court.

CONCLUSION

For all the foregoing reasons, Appellees' motion to dismiss or affirm should be denied and this Court should note probable jurisdiction and fully consider this conflict between the State of Ohio's compelling interest in eradicating discrimination and Appellees' right to act on religious belief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this reply brief of Appellants were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this _____ day of November, 1985 to William Bentley Ball, Philip J. Murren and Sandra E. Wise, Ball & Skelly, 511 North Second Street, P.O. Box 1108, Harrisburg, Pennsylvania, 17108 and Bruce E. Pence, Logothetis and Pence, 111 West First Street, Dayton, Ohio, 45402, Attorneys for Appellees.

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JOINT

APPENDIX

(5)

Supreme Court, U.S.
FILED
DEC 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-488

In The Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Jurisdictional Statement Filed September 20, 1985
Question of Jurisdiction Postponed November 12, 1985

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2. Motion for Temporary Restraining Order and Preliminary Injunction filed October 6, 1980.

3. Temporary Restraining Order entered restraining Defendants from proceeding with hearing concerning employment practices of Dayton Christian Schools, Inc. or otherwise intermeddling with DCS' free exercise and establishment of their religious beliefs, October 6, 1980.

* * *

4. Answer and Motion to Dismiss and Dissolve Temporary Restraining Order filed by Defendants October 16, 1980.

* * *

5. Order, by agreement of counsel, extending restraining order of October 6, 1980 until decision on the merits and consolidating hearing on preliminary injunction with hearing on merits entered November 5, 1980.

* * *

6. Final Pretrial Order, December 1, 1980.

* * *

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* * *

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* * *

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* * *

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* * *

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Plaintiffs' Exhibit 1

CERTIFICATE OF CONSOL'DATION

This is to certify that Dayton Christian School, Inc., Kettering, Montgomery County, Ohio, a non-profit corporation, and Christian High School, Inc., Dayton, Montgomery County, Ohio, a non-profit corporation, are now consolidated as Dayton Christian Schools, Inc., a non-profit corporation having a principal office at 2528 Wilmington Pike, Kettering, Ohio 45419.

PURPOSE

Section 1. The principal purpose of the Dayton Christian Schools, Inc. is to provide a program of education in a positive Christian atmosphere offering regular courses of study, in compliance with the laws and regulations of the State of Ohio and the State Board of Education.

Section 2. Other purposes and objectives of the Dayton Christian Schools, Inc. are as follows:

A. To provide for the students and faculty a classroom and campus environment commensurate with an institution having ultimate objectives which are Christ-centered, truly patriotic, and in obedience to God's Word.

B. To teach all subjects in a manner to create in each student an awareness of God's supreme authority over all creation.

C. To present the Bible, God's Word, as the only reliable and true revelation of God's

nature and His redeeming purpose and will for mankind.

D. To teach that the Lord Jesus Christ is the Son of God who came to earth to die for our sins.

E. To train and prepare youth to make worthy contributions to the cause of Christ in the home, church, and community.

F. To help each student aspire to positions of responsibility in full or part-time Christian service, wherever that call for service may be.

G. To own, and/or lease, and maintain real property, buildings, and other facilities and property.

H. To do any and all things necessary or incident to the accomplishment of any and all of the purposes.

Section 3.

A. No earnings or assets of the Corporation shall inure to the benefit of any individual or individuals.

B. No part of the activities of the Corporation will pertain to propaganda or attempts to influence legislation. This Corporation will not participate in or intervene in any political campaign on behalf of any candidate for public office.

DISSOLUTION

In the event it becomes necessary to dissolve and terminate the activities of this Corporation, the Board of Directors shall distribute the remaining assets, if any, after all just expenses have been paid and obligations met, to one or more religious associations, organizations, or conventions which at the time of dissolution qualify as tax-exempt Christian organizations under the terms of the United States Internal Revenue Code.

Christian Tabernacle and Patterson Park Brethren Churches, and/or either of these churches, if in existence at the time of dissolution and if tax-exempt Christian organizations, shall be considered as possible recipient(s) of portion(s) of the assets of the Corporation, in view of the substantial contributions of these churches to the Corporation.

Appointment of Agent:

I hereby accept appointment as agent of Dayton Christian Schools. Inc. upon whom process, tax notices or demands may be served.

Name: /s/ Claude E. Schindler, Jr.
Address: 681 Banbury Road
Dayton, Ohio 45459

The Terms of Consolidation

Patterson Park Brethren Church, Dayton Christian School, Inc., and Christian High School, Inc. have each approved by resolution the consolidation of Dayton Christian School, Inc. and Christian High School, Inc. into Dayton Christian Schools, Inc.

The consolidation agreement states that Patterson Park Brethren Church will assign to Dayton Christian Schools, Inc. the real property owned by Patterson Park Brethren Church

and present mortgage in regard to the property situated adjacent Wilmington Pike in Dayton, Ohio. The present value of the real property is approximately $60,000. That real property is now used by Dayton Christian School, Inc. Christian High School, Inc. will assign to Dayton Christian Schools, Inc. its present assets in the form of equipment valued at approximately $34,000. Dayton Christian School, Inc. will assign to Dayton Christian Schools, Inc. its present assets in the form of equipment valued at $6,500.

All existing liabilities of the Dayton Christian School, Inc. and Christian High School, Inc. will be transferred to and assumed by the new corporation, Dayton Christian Schools, Inc. The operations of Dayton Christian School, Inc. and Christian High School, Inc. will cease at the time of consolidation and control of all operations of these corporations will be assumed by the Board of Trustees of Dayton Christian Schools, Inc. as specified in the constitution approved by all three (3) organizations, a copy of which is included herewith.

* * *

[Signature of president and trustees omitted.]

[File stamp omitted]

Plaintiffs' Exhibit 2

CONSTITUTION

Dayton Christian Schools, Inc.
Dayton, Ohio

PREAMBLE

We, the undersigned, people of Christian persuasion and members of the Body of Jesus Christ, bound by the Word of God, have hereby set forth and adopted the following articles for the establishment, operation and control of a non-profit corporation, Dayton Christian Schools, Inc. The Corporation will provide an educational curriculum of the highest possible standards in order to prepare the student for purposeful Godliness in any vocation or entrance into institutions of higher learning. Further, as a regular part of the curriculum of the school(s) of the Corporation, each student will be taught Christian doctrine based on the Bible as the textbook authority for such instruction and learning.

This we do in obedience to God's Word, namely: to train children in the nuture and admonition of the Lord (Ephesians 6:4). Further, we recognize the necessity for the moral and spiritual development of our youth through Christian education in harmony with the Holy Bible.

STATEMENT OF FAITH

Each member of the Board of Directors and each member of the educational staff of the Corporation having accepted Jesus Christ as personal Savior, shall subscribe annually in writing to the following statement of Faith:

1. I believe the Bible to be the inspired and the only infallible authoritative Word of God.

2. I believe that there is one God, eternally existent in three persons: Father, Son and Holy Spirit.

3. I believe in the deity of our Lord Jesus Christ, in His Virgin Birth, in His sinless life, in His Miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory.

4. I believe that man is sinful by nature and that regeneration by the Holy Spirit is essential for his salvation.

5. I believe in the continuing ministry of the Holy Spirit, by whose indwelling the Christian is enabled to live a Godly life.

6. I believe in the resurrection of both the saved and the lost. They who are saved unto eternal life and they who are lost unto eternal damnation.

7. I believe in the spiritual unity of believers in our Lord Jesus Christ.

8. I believe in the creation of man by the direct Act of God.

ARTICLE I — NAME AND LOCATION

Section 1. The name of this educational corporation is Dayton Christian Schools, Inc., incorporated under the laws of the State of Ohio, as a non-profit corporation.

Section 2. The location and post office address of its principal office shall be:

Dayton Christian Schools, Inc.
325 Homewood Avenue
Dayton, Ohio 45405

ARTICLE II - PURPOSE

Section 1. The principal purpose of the Dayton Christian Schools, Inc. is to provide a program of education in a positive Christian atmosphere offering regular courses of study, in compliance with the laws and regulations of the State of Ohio and the State Board of Education.

Section 2. Other purposes and objectives of the Dayton Christian Schools, Inc. are as follows:

A. To provide for the students and faculty a classroom and campus environment commensurate with an institution having ultimate objectives which are Christ-centered, truly patriotic, and in obedience to God's Word.

B. To teach all subjects in a manner to create in each student an awareness of God's supreme authority over all creation.

C. To present the Bible, God's Word, as the only reliable and true revelation of God's nature and His redeeming purpose and will for mankind.

D. To teach that the Lord Jesus Christ is the Son of God who came to earth to die for our sins.

E. To train and prepare youth to make worthy contributions to the cause of Christ in the home, church and community.

F. To help each student aspire to positions of responsibility in full or part-time Christian service, wherever that call for service may be.

G. To own, and/or lease, and maintain real property, buildings, and other facilities and property.

H. To do any and all things necessary or incident to the accomplishment of any and all of the purposes.

I. No earnings or assets of the Corporation shall inure to the benefit of any individual or individuals.

J. No part of the activities of the Corporation will pertain to subversive propaganda or attempts to influence legislation. This Corporation will not participate in or intervene in any political campaign on behalf of any candidate for public office.

ARTICLE III — ORGANIZATION, RELATIONSHIPS, AND AUTHORITY

Section 1. The governing bo of this Corporation shall be the Board of Directors.

Section 2. Each member of the Board of Directors shall be a person known as a professing and exemplary Christian as perscribed in the Statement of Faith. Each member of the Board of Directors having qualified children should have them enrolled in a school of this Corporation. Any exception is subject to the approval of the School Board of Directors.

Section 3. The Board of Directors shall consist of twelve members, selected as follows:

A. One member of the Patterson Park Church, Dayton, Ohio, one member of Christian Tabernacle, Dayton, Ohio, and ten other persons. Each of the two named churches shall elect its member of the Board of Directors in accordance with the laws, rules, and regulations of

the respective church, and any vacancy which occurs during the term of office of a member of the Board of Directors so selected shall be filled by the respective church. Each person selected by either of the two churches named in this paragraph shall be approved by the Board of Directors prior to taking office as a member of the Board of Directors.

B. There shall be no more than three members of the Board of Directors who are members of any given church. The term "member of a church" as used in paragraphs A and B of this Section is to be construed to include a person who regularly attends a given church.

C. The ten members of the Board of Directors who do not represent one of the two churches named above shall be selected by the Board of Directors, and the Board of Directors is authorized to fill any vacancy which occurs during the terms of office of these ten members of the Board of Directors.

D. Each member of the Board of Directors shall have a term of office of three (3) years. The twelve members of the Board of Directors shall be divided into three groups, as to terms of office, with each group having four members. The three-year terms of office of each group shall begin on July 1 of the respective year, with the three groups beginning their terms of office in successive years. No person shall serve more than four consecutive terms of office as a member of the Board of Directors.

E. Ex-officio, non-voting members of the Board of Directors shall be:

A. Parent-Teacher Fellowship Chairman
B. Administrator
C. Director of Community Affairs

F. A member of the Board of Directors may be removed therefrom by a three-fourths vote of the total membership of the Board of Directors.

ARTICLE IV — OFFICERS OF THE BOARD OF DIRECTORS

The Board of Directors shall elect from its membership its officers: a Chairman, a Vice Chairman, a Secretary and a Treasurer. The authority and responsibility of the officers are:

A. The CHAIRMAN shall coordinate the workings of the Board of Directors, preside at all meetings of the Board of Directors, and is an ex-officio member of all committees of the Board of Directors.

B. The VICE CHAIRMAN shall perform the duties of the Chairman in his absence and shall have any other duties determined by the Board of Directors.

C. The SECRETARY shall record and maintain a file of minutes of the Board of Directors and any other records, as determined by the Board of Directors. He shall be responsible for all correspondence of the Board of Directors.

D. The TREASURER shall be responsible for the receiving and disbursing of all monies and the keeping of an accurate accounting of the same. He shall be responsible for sending receipts for fees and gifts. The treasurer may be Chairman of the Financial Committee.

E. The term of each officer shall be for a period of one year, beginning July 1.

ARTICLE V — FUNCTIONS OF THE BOARD OF DIRECTORS

Section 1. The Board of Directors shall:

A. Serve as spiritual leaders of the Corporation, waiting upon God for His direction and wisdom.

B. Approve an annual budget. This may be based upon the recommendation of the Administrator and finance committee.

C. Examine for approval the school year calendar(s).

D. Employ all salaried personnel of the Corporation.

E. Serve as final board of appeals in all misunderstandings involving personnel employed by the Corporation.

F. Devise ways and means for obtaining the necessary funds for operating the school(s) and determine how these funds shall be distributed.

G. Propagate the cause of Christian education in the community by means of public meetings, literature, etc.

H. Maintain a good working relationship with local public schools, with the State Department of Public Education, with the accrediting associations, and with Christian School associations.

I. Perform other duties and functions commensurate with those of the governing body of a non-profit corporation.

Section 2. The Board of Directors shall establish and maintain a Financial Committee. The Financial Committee shall:

A. Submit a financial report at least quarterly to the Board of Directors.

B. Submit an annual budget to the Board in accordance with provisions stated in the Policy Manual.

Section 3. Each member of the Board of Directors shall be a trustee of the Corporation. Thus the Board of Directors shall serve as the Board of Trustees of the Corporation.

Section 4. The Board of Directors shall annually appoint a qualified Auditing Committee, consisting of at least three persons who will audit all financial records of the Corporation.

Section 5. Meetings:

A. The Board of Directors shall meet at least once each month. Such established monthly meetings shall be referred to as "regular monthly meetings".

B. Other meetings of the Board of Directors may be called by the Chairman thereof or by any two other officers thereof.

C. The Board of Directors shall be given a minimum of a one (1) week notice for any regular monthly meeting and 24 hours for other meetings.

D. A duly authorized meeting of the Board of Directors is a meeting in accordance with the provisions of this Section of this Constitution. A simple majority of its members shall constitute a quorum necessary to conduct official business.

E. The annual meeting of the Board of Directors shall occur during the month of June.

F. Unless otherwise specified in this Constitution, any action by the Board of Directors shall result from an affirmative vote of the members thereof present at any duly authorized meeting of the Board of Directors.

ARTICLE VI — BOARD OF ADVISORS

A Board of Advisors shall be established and maintained by the Board of Directors and shall consist of pastor(s), distinguished educators, civic leaders, professional people, and business men who are interested in the welfare and operation of the school(s) of the Corporation. The Board of Advisors will serve as a sounding board of the Corporation and will be consulted from time to time for their comments and recommendations on plans and policies of the school.

ARTICLE VII - POLICY MANUAL

A. The Policy Manual shall provide for committees and set forth the functions thereof. The following are examples of committees which may be established and maintained:

1. Education Committee
2. Public Relations Committee
3. Building Committee
4. Transportation Committee
5. Long-Range Planning Committee
6. Admissions Committee
7. Spiritual Affairs Committee
8. Special Activities Committee

B. The Policy Manual shall also include job descriptions of the Administrators, Director of Community Affairs, principal(s), teachers, and other employees.

ARTICLE VIII — EDUCATIONAL STAFF

Section 1. An Administrator, a Director of Community Affairs, principal(s), and teachers shall be appointed by the Board of Directors after careful consideration of their spiritual, academic, and other qualifications. All of these appointments shall be for such terms and with such salary and other conditions as the Board of Directors may determine. A three-fourths vote of the total membership of the Board of Directors shall be required to employ a person for any of these positions.

Section 2. All educational staff members must be members of a church having a doctrine which is in agreement with the Statement of Faith, must be scripturally sound in their teaching, and must lead exemplary Christian lives.

Section 3. Persons who are in teaching positions shall meet the requirements of the State of Ohio for teacher certification.

Section 4. The Board of Directors shall have the right to dismiss any employee who proves an inability to instruct or whose personal life or instruction conflicts with the basis and purposes of the Corporation or whose performance does not meet standards maintained by the Board of Directors.

ARTICLE IX — ENROLLMENT

Section 1. With regard to qualifications and enrollment, this Corporation shall have no restriction concerning a student's race, national origin, or church background.

Section 2. Each student and each parent, sponsor, or guardian of a student shall accept and conform to the guidelines of behavior and deportment as established by the Corporation.

Section 3. Each student and each parent, sponsor, or guardian of a student shall recognize without reservation the Corporation's right to uphold its "Statement of Faith" and to fullfill its "Purposes" as set forth in this Constitution.

ARTICLE X — DISSOLUTION

In the event it becomes necessary to dissolve and terminate the activities of this Corporation, the Board of Directors shall distribute the remaining assets, if any, after all just expenses have been paid and obligations met, to one or more Christian associations, organizations, or conventions which at the time of dissolution qualify as tax-exempt Christian organizations under the terms of the United States Internal Revenue Code.

Christian Tabernacle and Patterson Park Churches, and/or either of these churches, if in existence at the time of dissolution and if tax-exempt Christian organizations shall be considered as possible recipient(s) of portion(s) of the assets of the Corporation, in view of the substantial contributions of these churches to the Corporation.

ARTICLE XI — AMENDMENTS

The Preamble, the Statement of Faith, Purpose, set forth above in this Constitution may not be amended; but if this condition is ever violated, Patterson Park Church may demand and shall receive their original capitol investment in the Wilmington Avenue property of $50,000 and Christian Tabernacle shall demand and receive $25,000 for their original investment in school furniture and equipment. Other portions of this Constitution may be amended by a three-fourths vote of the total membership of the Board of Directors at a regular monthly meeting thereof after discussion of the proposed amendment during at least two of the five regular monthly meetings thereof immediately preceding the meeting at which the vote is taken.

Plaintiffs' Exhibit 3
[Dayton Christian Schools Letterhead omitted]

Dear Employment Candidate:

Thank you for your interest in a teaching position with Dayton Christian Schools, Inc. Dayton Christian Schools is an inter-denominational ministry offering a Christ-centered education in grades Pre-K through 12.

Our goal is to provide a quality educational program that is based upon the Word of God. In fulfilling this objective, our school system has been evaluated by the State Board of Education, and has received its charter, indicating that we meet all the standards imposed upon public schools. The major distinction of DCS is the fact that all truth is related and interpreted from God's viewpoint. Because of this distinctive, a basic knowledge of the Bible is vital for each candidate seeking employment in our system.

If you feel God has called you into the Christian School movement and you profess to know Jesus Christ as your Lord and Savior, and have the Bible training and educational training required, we would appreciate your completing the enclosed application and returning it to us at your earliest convenience. Once an application is received in our office your teaching specialty will be compared against available positions. If there is an available position, references will be checked and we will contact you for an interview. Before your interview, you will need to read one or both of the books listed below.

1. *Educating for Eternity*, Schindler, Claude E. Jr. & Pacheco Pyle. Tyndale House Publishers, Wheaton, Illinois.

2. *The Philosophy of Christian School Education*, Edited by Paul A. Kienel, Association of Christian Schools International, P.O. Box 4097, Whittier, California 90607.

Thank you for your interest in Dayton Christian Schools.

In His Service,

Claude E. Schindler, Jr.
Superintendent

[Enclosure omitted.]

Plaintiffs' Exhibit 5
[Dayton Christian Schools Letterhead omitted]

INTERVIEW QUESTIONS

1. Have you read *Educating for Eternity* or *Philosophy of Christian School Education?*

2. Tell us about your family.

3. Why do you want to teach in a Christian school? Is it a conviction or a preference?

4. How do you respond to authority?

5. What do you feel is your strength as a teacher?

6. What do you feel is your weakness as a teacher?

7. If single, what does your father think of your teaching in a Christian school?

8. In all humility what do you like about yourself?

9. What do you dislike about yourself?

10. If single, what do you think about marriage - about a life of singleness?

11. Where do you place parents in your role as a teacher?

12. What have you learned recently about the Word of God?

13. Are you in debt?

14. When do you think a student should be sent to the office for discipline?

15. Can you foresee some problems that may arise in a Christian school but would not in a public school?

16. Do you see Christian education as a conviction or a preference for Christian parents?

17. What do you believe your spiritual gift to be?

18. If you were to employ yourself, what help would you need?

19. How would you teach a particular subject differently in a Christian school than in a public school?

Plaintiffs' Exhibit 8
[Dayton Christian Schools Letterhead omitted]

Dear Parents:

We are pleased to learn of your interest in Dayton Christian Schools, Inc. As you will note in the enclosed brochure, we offer a Christ-centered academic program, fully chartered by the State of Ohio, which covers Day Care, Pre-Kindergarten, and Kindergarten through Grade 12. Our program is based around the Word of God as the center of all truth and utilizes dedicated Christian teachers and staff members.

You are encouraged to take particular notice of our Admission Policies. If you, as a family, agree fully with our Statement of Faith and the criteria for admission, we then encourage you to fill out the enclosed application in its entirety and return it to the school office as soon as possible. As soon as we have received and reviewed your application and your child has been tested, we will contact you to schedule an interview with a member of our administrative staff.

We feel strongly that according to God's Word, ALL Christian children belong in an educational system where Jesus Christ is pre-eminent (Colossians 1:18) and where they are taught to love the Lord their God with all their heart (Deuteronomy 6:5-7). Because of this belief, a financial aid program is provided so that no one is denied a Christian education because of lack of money. Information regarding the financial aid program is available from the school office.

Sincerely in Christ,

/s/ Claude (Bud) E. Schindler, Jr.
Superintendent

CES:raf
Encs.

Plaintiffs' Exhibit 13
[Excerpt from Application for Admission]
PARENTAL COMMITMENT

18. In signing this application, we give permission for our child to take part in all school activities, including sports and school sponsored trips away from the school premises (except as specifically listed below). Further, in the event our child becomes ill or is injured while under school supervision, we approve the school authorities taking the following steps:

a) Contact a parent of the student and follow his instructions.

b) In the event neither parent can be reached, contact the student's physician and follow his instructions.

c) If the student's physician cannot be reached, the school authorities will use their own discretion in contacting a properly licensed practicing physician and follow his instructions.

We agree to relieve the school board and any of its employees from any liability in connection with these activities and instructions.

Exceptions (if any):

19. In signing this application, we acknowledge the following:

a) Our personal acceptance and commitment to Jesus Christ as Savior.

b) Our commitment to participate in the Christian education of our son or daughter with regular attendance at a Bible-believing church as a family and by exemplifying Christian principles of life in our home.

c) Our commitment to the Statement of Faith of Dayton Christian Schools.

d) Our commitment to the policies of Dayton Christian Schools as stated in this application and in the Student Handbook.

e) Our commitment to donate a minimum of twenty(20) hours per year of voluntary labor to Dayton Christian or pay a corresponding dollar figure.

f) Our commitment to give beyond our tuition as God leads and enables.

g) Our commitment to attend all PTF meetings and lend our support to the program.

h) Our commitment to pledge our fullest cooperation to keep doctrinal controversy and denominationalism out of the school at all times (Romans 13:8-10; I Cor. 12:12-14; 13:1-13; Gal. 5:13-15, 25, 26; Eph. 4:1-7).

i) Our commitment to agree that if our child should become involved in any trouble, or we disagree with any policy set by the school, we will in no case complain to any other party, and in the spirit of meekness will register only necessary complaints with the teacher or principal involved (Matt. 18:15-17).

j) Our commitment to pay the tuition either annually, semi-annually, or monthly (10) months. We understand that tuition is due on July 5th. If tuition is paid by the month, the payment is due on the 5th, and if made by the 15th, there will be no service charge. After the 15th, a $5.00 service charge will be added to the monthly tuition figure.

k) We further agree to the following financial policy on Withdrawals and Admissions:
   1. Withdrawals:
      a. If we withdraw from the school because of being transferred or moving out of the city, we

are responsible for paying the tuition for the month that we withdraw and the next month.

b. If we leave the school at the request of the school administration, we are responsible for the month that we leave and the next month.

c. If we leave the school to enroll in the public school, we will be responsible for the entire semester that we are in. (Exception: Withdrawal at the end of the first semester would require one additional month of payment.)

2. Admissions:

a. A new family enrolling in the school who was not on the waiting list at the beginning of the school year, will be responsible for paying the month that they enroll, plus the prior month.

b. A family on the waiting list at the beginning of the school year will pay for the month that they are officially enrolled and accepted into a class at Dayton Christian Schools.

l) We realize that all final grades and credits will be held until accounts are paid in full. Records will not be transferred to another school if money is due the school.

SIGNATURE OF COMMITMENT _____
(Father)

SIGNATURE OF COMMITMENT _____
(Mother)

Date ___ _____

STATEMENT OF FAITH

The basis of the programs and services of Dayton Christian Schools, Inc., shall be the Word of God as interpreted by the following statement of faith. We believe:

1. The Bible to be the inspired and only infallible authoritative Word of God.

2. That there is one God, eternally existent in three persons: Father, Son, and Holy Spirit.

3. In the deity of our Lord Jesus Christ, in His virgin birth, in His sinless life, in His miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory.

4. That man is sinful by nature and that regeneration by the Holy Spirit is essential for his salvation.

5. In the continuing ministry of the Holy Spirit, by whose indwelling the Christian is enabled to live a godly life.

6. In the resurrection of both the saved and the lost; they who are saved unto life, and they who are lost unto damnation.

7. In the creation of man by the direct Act of God.

8. In the spiritual unity of believers in our Lord Jesus Christ.

DCS neither supports or endorses the World Council of Churches, National Council of Churches or any other world, national or regional organization which gives recognition to unbelievers or which advocates multi-faith union.

Please attach to application:

1. Pre-Registration form for testing.
2. Your response to question no. 17.
3. A recent photo of the applicant with name on back.

[Area specified for student photo omitted]

Plaintiffs' Exhibit 16
[Dayton Christian Schools Letterhead omitted]

Re:

Dear

The individual named above has made application for a teaching position with Dayton Christian Schools, Inc.

We are seeking your advice concerning this person's ability and character; but we desire to obtain only information which is in keeping with the Lord's principles as found in Matthew 18:15. Therefore, please do not share any faults or negative thoughts about this person if you've not counselled them regarding this deficiency.

Your insights and comments are warmly welcomed.

In Christ's Service,

/s/ Claude E. Schindler, Jr.
Superintendent

CES/cn
Enclosure: Return Envelope

Plaintiffs' Exhibit 21
[Dayton Christian Schools Letterhead omitted]

[Excerpts From]

TEACHER'S MANUAL

A LETTER FROM YOUR ADMINISTRATORS

WELCOME to the DAYTON CHRISTIAN SCHOOLS family of professional educators. You are being called upon, as a missionary, serving in the field of Christian Education, to help mold and shape pliable young lives for the honor and glory of our Savior and Lord, Jesus Christ.

Your possession and expression of a Christian world view and life style is not only encouraged here — it is required. You will be supported in your efforts by colleagues and administrators who share your biblical convictions.

You've been selected and set apart for this ministry at Dayton Christian because we believe you'll be an asset to the school and will play a vital role in the lives of our students. We feel greatly blessed of God to have you here.

May God pour out His blessing on our joint efforts as we serve Him together in His ministry at Dayton Christian Schools.

* * *

HISTORY

PAST, PRESENT, AND FUTURE OF DAYTON CHRISTIAN SCHOOLS

In 1963 God moved the Patterson Park Brethren Church to implement a Christian School in Dayton utilizing the church's facilities. Several years later in 1967, God moved

among the members and leadership of Christian Tabernacle Church to establish a Christian high school in its facilities.

Patterson Park Brethren Church was able to see God's leading when a beautiful nine acre campus was obtained at 2528 Wilmington Pike in Kettering for its expanding elementary program. To provide for future expansion an additional ten acres of land was purchased in 1970 adjacent to the Wilmington Pike campus.

By 1971 it became apparent that the two ministries were striving for the same goals and thus a merger was brought about. Dayton Christian Schools, Incorporated, was formed with 394 students enrolled.

Originally, plans were made to move the high school from Christian Tabernacle Church in downtown Dayton, to the 19 acre Wilmington Pike campus. However, in 1974 the Lord permitted Dayton Christian Schools to obtain the former Julianne High School and convent at 325 Homewood Avenue.

Just a year later an additional elementary school was added in the former convent with 287 students in attendance.

Today, Dayton Christian Schools has close to 1600 students in five programs - High School, Junior High, Middle School, North Elementary and South Elementary. Other Dayton Christian Schools ministries include three day care programs and three thrift shop programs, which compliment and assist in the financial burden of the School's ministry.

Dayton Christian Schools envisions a continually growing ministry until Christ returns to call away His own. The present rate of growth ranges between 100 and 300 new students per year!

STATEMENT OF FAITH OF DAYTON CHRISTIAN SCHOOLS

Dayton Christian Schools was founded and functions upon the basic fundamental principles of the Word of God, and it espouses the historic Christian view of life as presented in the BIBLE. The following statements of faith and practice are held by every Dayton Christian School employee and school family:

1. I believe the BIBLE to be the inspired and only infallible authoritative Word of God.

2. I believe that there is one God, eternally existent in three persons: the Father, Son, and Holy Ghost.

3. I believe in the diety of our Lord Jesus Christ, in His virgin birth, in His sinless life, in His miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory.

4. I believe that man is sinful by nature and that regeneration by the Holy Spirit is essential for his salvation.

5. I believe in the continuing ministry of the Holy Spirit, by whose indwelling the Christian is enabled to live a Godly life.

6. I believe in the resurrection of both the saved and the lost. They who are saved unto eternal life, and they who are lost unto eternal damnation.

7. I believe in the spiritual unity of believers in our Lord Jesus Christ.

8. I believe in the creation of man by the direct act of God.

Dayton Christian Schools neither supports nor endorses

the World Council of Churches, National Council of Churches or any other world, national, or regional organization which gives Christian recognition to unbelievers or which advocates multi-faith union.

THE EDUCATIONAL PHILOSOPHY OF DAYTON CHRISTIAN SCHOOLS

The educational philosophy of Dayton Christian Schools is based on a God-centered view of truth and man as presented in the Bible. Since God created and sustains all things through His Son, Jesus Christ, the universe and all life are dynamically related to God and have the purpose of glorifying Him. This is pointedly true of man who was made in God's image, different in kind from all other creation, with the unique capacity to know and respond to God personally and voluntarily. Because man is a sinner by nature and choice, however, he cannot, in this condition, know or honor God in his life. He can do this only by being born again through receiving Jesus Christ as Savior and Lord, and thus be enabled to do God's will, which is the ultimate purpose of his life.

The entire process of education is seen as a means used by the Holy Spirit to bring the student into fellowship with God, to help him become strong or mighty in the Spirit, to assist him in developing a Christian mind, to enable him to think God's thoughts, to train him in Christ-likeness, to teach him to act like God and to help the student demonstrate Christ-like character qualities so that he can fulfill God's total purpose for his life personally and vocationally. He is taught the Bible so he may understand God as well as his own true nature and function as God's image. He is developed and related to God as a whole person, that is: spiritually, mentally, physically and socially. He is taught to see all truth as God's truth and to integrate it with, and interpret it by, God's Word. He is educated as an individual with his own unique abilities and personality who learns to live and work with others at home, in the church and in a changing secular society. He

interacts with and is taught by parent and teacher models who are themselves born again and have this perspective on life.

The authority for such an education comes both from God's command that children be taught to love God and place Him first in their lives and from the fact that parents are responsible for the total education and training of their children. At the parents' request, the Christian school, along with the church, becomes a partner in giving this education. The Christian school is an extension of the local evangelical fundamental church's Christian education program, serving the parent in fulfilling their responsibility of educating the child. From this philosophy stem certain aims and objectives:

I. FOR THE SPIRITUAL AND MORAL GROWTH OF THE STUDENTS, the school seeks:

1. To teach the Bible as God's inspired Word and to develop attitudes of love and respect toward it.

2. To teach the basic doctrines of the Bible. (i.e., God, Jesus Christ, Holy Spirit, Man, Salvation, Church, Scriptures, Satan, Angels.)

3. To lead the pupil to a decision of confessing Christ as Savior & Lord.

4. To develop a desire to know and obey the Will of God as revealed in the Scriptures.

5. To equip the student to carry out the Will of God daily.

6. To impart an understanding of each Christian's place in the church and its worldwide task of witnessing, evangelizing and discipling, and to stimulate the student's involved in this task.

7. To develop the mind of Christ toward godliness and sin and to teach the students how to overcome sin.

8. To encourage the development of self-discipline and responsibility in the student based on respect for and submission to God and all other authority.

9. To help the student develop for himself a Christian world view by integrating life and studies with the Bible.

II. FOR THE STUDENTS' PERSONAL AND SOCIAL DEVELOPMENT, THE School aims

1. To help the student develop his personality based on a proper understanding and acceptance of himself as a unique individual created in the image of God and on the fullest possible development of his own capabilities.

2. To teach the students to treat everyone with love and respect as unique individuals made in God's image.

3. To make the student a contributing member of his society who realizes his dependence on others and their dependence on him and the need to serve them.

4. To promote an understanding of time as a God-given commodity and the individual's responsibility for effective use of time.

5. To show a realistic and Biblical view of life and work, and provide skills for personal relationships and future endeavors.

6. To develop both good and proper attitudes toward marriage and the family and also the understanding and skills needed to establish God-honoring homes.

7. To promote physical fitness, good health habits, and wise use of the body as the Temple of God.

8. To impart the Biblical attitudes toward material things

and to encourage individual responsibility of using them for God's glory.

9. To engender an appreciation of the fine arts through the development of the student's understanding and personal expression.

III. ACADEMICALLY, the school endeavors

1. To promote high academic standards within the potential of the individual as uniquely created by God and to help the student realize his full academic potential.

2. To help each student gain a thorough comprehension and command of the fundamental processes used in communicating and dealing with others, such as reading, writing, speaking, listening and mathematics.

3. To teach and encourage the use of good study habits.

4. To teach the student how to do independent research and to reason logically.

5. To motivate the student to pursue independent study in areas of personal interest.

6. To develop creative and critical thinking and the proper use of Biblical criteria for evaluation.

7. To promote good citizenship through developing an understanding and appreciation of our Christian and American heritages of responsible freedom, human dignity and acceptance of authority.

8. To discuss current affairs in all fields and relate them to God's plan for man.

9. To produce an understanding and appreciation for God's world, an awareness of man's role in his environment and his God-given responsibilities to use and preserve it properly.

IV. WORKING WITH THE HOMES FROM WHICH THE STUDENTS COME, the school desires

1. To bring those whom we find that are not Christians to the saving knowledge of Jesus Christ.

2. To aid families in Christian growth and to help them develop Christ-centered homes.

3. To cooperate closely as servants to the parents in every phase of the student's development, especially as it relates to the school program.

4. To help the parents to understand the school's purpose and program.

5. To assist parents in keeping up with the changing culture and its effect on the home and the implications for their children.

6. To encourage regular attendance and involvement in the local church.

7. To encourage parents to realize and shoulder their responsibility for the spiritual, moral and social education of their children.

CHRISTIAN INTEGRATION OF CLASSROOM INSTRUCTION

GOALS: In a Christian school all studies and activities should be God-centered and related to the spiritual. The goal is to promote a God-consciousness in the students and make them realize that He cannot be separated from any

area of life or truth, and must not be separated from any part of their lives. Creating and developing a Christian mind is a foremost goal of the Christian school.

METHOD: Teachers must be alert in preparation and teaching to think through their lessons carefully as to the Christian approach and God's relation to the subject at hand, and present their findings to the students. In seeking to do this the teacher should not be preachy or stretch the imagination in order to find some correlation.

In presenting any lesson, the Christian teacher should be aware that he is dealing with God's truth, for all truth is His. Throughout the year, the students should become convinced of this fact both by the teaching and by the attitude of the teacher. Further correlation can be found between the particulars of each subject and the Bible. These should be explored and explained to the students. We must beware of trying to find a Scripture verse of illustration for everything we teach. This is neither possible, nor necessary. We must remember, however, that since God is revealed in all His creation (Psalm 19:1), His wisdom and handiwork are seen in all subjects. The teacher's task is to bring the student face to face with God at every turn of study.

THE TEACHER'S PLACE: True integration of subject matter hinges on the *teacher's personal devotional study of the Bible*. As we live in the Word of God and in our subject fields, we will find much common ground and God's truth will become integrated in our thinking. As *our lives and thoughts* thus become integrated spiritually, we will be enabled to naturally, without straining, convey this to the students. Integration must not be forced.

SCRIPTURE FILE: In order to help us concentrate on this vital area of the Christian school program, we ask each teacher to submit a periodic report to the Principal, showing the Scripture verses, ideas or reference materials which he has used or has found in the Scriptures. This information will be filled in the Office in a card file which is available to the entire faculty.

THINKING THROUGH THE INTEGRATION OF SUBJECT MATTER IN A CHRISTIAN SCHOOL

Below are some questions which should help us as we carefully consider the all important subject of integration of all truth. If Dr. Frank Gaebelein is correct in asserting that "this matter of integration...is the problem of all problems," then we must give it careful and detailed consideration.

1. What was God's purpose in creating all things (truth included)?

2. Is there common ground between all other subject areas and the Bible?

3. Can we distinguish between indoctrination correlation, illustration and integration in teaching?

4. If a teacher is the touchstone of education, what does this imply for the Christian teacher in the Christian School?

5. What are some objectives we hope to attain through this integration?

6. Since every teacher on every grade level cannot teach all the truths and lessons about God to be learned through His creation, and since attitudes are formed during a long period of time, what truths and areas of integration in subject matter should be taught at the various grade levels?

7. What methods are most effective in this process of integration?

8. How shall we evaluate the students' understanding and application of these truths?

9. In what ways can we, as teachers, become better equipped for the task of teaching in this manner?

10. Are there any reference materials available to help us think these issues through?

THE FOLLOWING ARE SOME REFERENCE MATERIALS:

BOOKS:

THE PHILOSOPHY OF CHRISTIAN SCHOOL EDUCATION/Kienel
THE PATTERN OF GOD'S TRUTH/Gaebelein
TO THOSE WHO TEACH IN CHRISTIAN SCHOOLS/Lowrie
EDUCATING FOR ETERNITY/Schindler
REASONS FOR SENDING YOUR CHILD TO A CHRISTIAN SCHOOL/Kienel
WHICH WAY TO EDUCATE/May
EDUCATION FOR THE REAL WORLD/Morris
A CHRISTIAN APPROACH TO EDUCATION/Byrne
DESIGN FOR DISCIPLESHIP/Pentecost
COMPETENT TO COUNSEL/Adams

* * *

Parent-Teacher Conferences

* * *

III. Areas to discuss:
   a. Grades and how parents feel about them.
   b. Personal attributes that stand out.
   c. Personal interests of the student (Hobbies, sports, etc.)
   d. Spiritual interest of student.
   e. Christian approach to the home.
   f. Questions about any aspect of the whole school program that may be of interest or concern to the parent.
   g. Parents' knowledge and understanding of their child.

IV. Good possible leading questions:
   a. Since we see ourselves as servants to the home, we should start by asking the parent what we can do to better assist them in training their young person.
   b. What changes or growth have you seen in the student at home?

   c. Have you seen any evidences of spiritual interest in the student?
   d. How do you feel about the grades he or she received?
   e. Are there any areas of school life or activity about which you have questions or comments?
   f. Have there been any changes at school that have been helpful or poor, this year, in comparison with others?
   g. How would you evaluate your child on the personal evaluation sheet?
   h. How is your child contributing or further the Christian education of your child, e.g., family altar, Bible reading, prayer?

V. Making the report: Make a thorough report immediately following the conference, while it is still fresh on your mind. Note especially the following:
   a. Time and date of conference (especially the year).
   b. Name of parent, child, and your name.
   c. Student's progress.
   d. Parents' reaction and attitudes in conference.
   e. Your appraisal of parent's Christian experience.

PERSONAL COUNSELING SUGGESTIONS

Personal counseling is an understanding between persons which influence the life of the one being counseled. Christian counseling always leads to Christ Himself. In a sense you are a salesman out to sell first yourself, and then, Jesus Christ. You will have to work at it.

Individualize: Remember you are working with individuals even though part of a group.

1. Learn their names, and match their faces. BE able to call each by his first name within the first week.

2. Do not try to force your will and way on a student. All people are different, and will not respond in the same way in a given situation.

3. Have a sympathetic understanding of the varied home backgrounds from which your counselees have come and the predicaments in which each is now presently involved. Never assume that all is well with anyone of them until you have become confidently aware of the fact through personal acquaintance.

4. Have genuine personal concern for each one and make it your job to get close to and talk with each one individually during the year.

5. Be alert and sensitive throughout the year to the needs of individuals, - those who are lonely, those under conviction, those ready to yield to the Lord, but who lack understanding. Many times just a word at the *ripe* time is all that is needed to open a full counselling opportunity.

Be available. Do not be so busy and appear so rushed or important that your students feel they should not bother you. Be willing to spend time with them.

Be a good listener. Become familiar with the problem before you dole out advice. Many times simply "talking it out" will aid the counselee to find the solution himself without your actually having told him.

Talk their language. Avoid trite terminology and ambiguous terms.

Avoid controversial doctrinal Issues. Our fellowship is around Christ, not doctrine. These students will come from churches with varying beliefs and we must respect them.

Do not be dogmatic about anything other than vital major areas of Biblical Truth - and the fact that God will always prove faithful in leading a life yielded to Him.

Guard against pointless discussions of amusements and other areas of worldliness, realizing that no list can be all inclusive enough. Rather, be positive and endeavor to cause your students to fall so in love with Jesus Christ and to gain such a appetite for His Word that "the things of earth will grow strangely dim in the light of His glory and grace."

Do not pretend to have the answer when you do not. Frankly admit your limitations and offer help in finding the answer.

Be practical in your counsel. If the student is not a Christian, try to lead him to the Savior. If he is a Christian, to confession and repentance; but realize the burden and frustration of the practical implications of the problem which may still continue to face the person. Let your goal be constantly and always to attract students to the Christ of the Cross, and the life of victory and fruit-bearing available in Him. Endeavor to be more than evangelistic. Seek to lead Christians into a deeper life with the Lord. This will place the burden of proof on YOU!

Be Biblical in your counsel. Do not give good advice. Point out what God says about this problem in the Bible. Psal. 119:9, 11, 104, 105.

* * *

ENTERTAINMENT

1. No entertainment of any kind shall be permitted without the express permission of the Principal and the Fine Arts Committee and/or Chapel Committee.

2. No itinerant lecturer shall be permitted to talk to the pupils unless permission has been obtained from the Principal.

3. No literature of any kind shall be distributed or made available in the classrooms or on the campus without permission from the Principal.

STUDENT REQUIREMENTS AND PCLICIES

DISCIPLINE

A Christian school must have a philosophy of discipline based on the Scriptures. Some guidelines as we build toward such a goal are:

1. Discipline has moral content. The foundation is our amenability to God and the revelation of His standard of righteous conduct. It is both positive and negative.

2. Christian love is at the heart of all discipline. The dark side of love (correction and chastening) is an essential part of this firmness in love. They must be balanced. Firmness minus love becomes harsh; whereas love without firmness is sentimentality. Both errors produce instead of solve problems.

3. The responsibility and authority to discipline comes from God. A teacher stands in "loco parentis" - that is, in the parent's stead. He has the same God-given authority they have.

4. All discipline is designed to show the child his sinful nature and lead him to submit himself to God's will. We must beware of "holding God over their heads"; thus making them unconsciously dislike Him.

5. Practical helps are found in the Bible; e.g. Proverbs, Hebrews 12, God dealing with Israel, etc.

6. As a Christian school, whenever we find it necessary to discipline the young people, it is most imperative that we try to teach them a spiritual lesson through it. Obviously, this involves a prayer-time after discipline has been administered.

* * *

Student Dress Regulations

Proper grooming must be taught along with other rules

of manner and morals, and Dayton Christian Schools support the emphasis of the Christian home in matters of modesty, dress, hair styles, and good grooming. DCS through its dress guidelines seeks every means at its disposal, including dress, to encourage its students to think and act like Christian ladies and gentlemen. It serves to give the student a distinctive appearance, encouraging Christian deportment, and engendering school pride. It seeks to create an atmosphere conducive to learning.

Statement of Biblical Principles:

1. a. Our dress should be characterized by modesty, which means reserved, chaste, or pure in speech, manner and dress. It should be therefore appropriate and sensible. The objective is that through modesty we might win some to Christ, by modesty emphasize the inner qualities. Modesty in effect, mirrors the inner being through outer appearance.

   b. Our dress should give an appearance that reflects our mission as messengers (messengers on a pilgrimage and messengers in a priestly role). (I Peter 2:11)

   c. Our dress should maintain the distinction between the sexes. (I Peter 3:1-6, I Timothy 2:9, Deut. 22:5, I Cor. 6:9,10)

2. a. Our dress should reflect our Christian walk and character. The objective is that clothes are a badge by which we communicate. There should always be cleanliness, neatness and modesty.

   b. Our dress should characterize a believer's freedom, meaning "not the right to do what we want, but the power to do what we ought" - Gothard.

c. Our dress should enhance our good works and is the proper accompaniment of godliness. The objective is to give priority to the spiritual drive over the physical and psychological drives. (I Tim. 2:20-25, Matthew 11:7,8, Galatians 5:12, I Cor. 6:22,23, I Tim. 2:9-15)

3. a. Our dress should not defraud, meaning "to arouse sexual desire in another that cannot be righteously satisfied"-Gothard. We cannot dress as though all had a sanctified mind. We cannot offend the weak.

b. Our dress should not be designed to be an appeal to sensuality.

c. Our dress should not suggest conformity to the world. (I Thess. 4:3-8, I Cor. 8:9, I Peter 2:11, Isaiah 3:16-24, James 4:1-4, 1 Jn2:15-16).

It is in the spirit of these principles that we seek to provide guidelines for students in grades K-12.

* * *

from the Principal, and must be paid for immediately. Please keep your calls at a mininum—and conversations to a minimum time, as we are functioning on very few lines. All school telephones are for school business only. The public pay telephone is available for student use—(limit calls to 5 minutes). Students and teachers should not be called during school hours except in cases of emergency.

STUDENT-FACULTY RELATION3HIPS:

It is understood that every student at DCS should develop and maintain an attitude of respect for each teacher and for fellow students. The proper method of addressing a teacher is to use the form: Miss, Mrs. or Mr., and all replies

should be given respectfully. This standard is applicable on the athletic field and throughout the school day, including all school programs and activities which are sponsored by Dayton Christian Schools.

SCHOOL DAY SCHEDULE:

The school day begins promptly with Faculty Devotions. Each faculty member is assigned a day in which to share a brief devotional thought and lead in a time of prayer.

Faculty are to stay in their classrooms until 3:30 p.m. each day.

If you leave the building for any reason during the day, *please check out through the office* as it is mandatory that we know your schedule during the day.

FACULTY DEVOTIONS:

Faculty devotions are held each morning before the starting of school. Starting time will vary by building. While the time of sharing is not long, it can be very meaningful if planned well and begun on time. It should be stressed that everyone keep within the time limits. This is a basic courtesy extended to the rest of the faculty who have many duties to attend to before the bells ring to begin class.

There are no limitations set up for how you lead the time together. Your own creativity can be used to do whatever you feel led of the Lord to do.

Staff members in the past have found these minutes together of real benefit as they share their prayer requests and the Lord's answers.

FUND RAISING:

All fund raising projects must be cleared with the Superintendent's Office through your building Principal. All projects must meet the following criteria:

* * *

ALL FACULTY AND STAFF MEMBERS ARE ASKED TO SIGN THE FOLLOWING FORM, THEREBY COMMITTING THEMSELVES TO GIVING ONLY A GOOD REPORT.

GIVING A

GOOD REPORT

In obedience to the Word of God, we hereby commit ourselves to the goal of giving a good report. When this is not possible, we purpose to remain silent or to privately go to the person, confirm our goal, and explain the offense that would hinder us from giving a good report. We hereby purpose to approach an offender in a spirit of genuine love having first examined and corrected our own attitudes and actions. Only if we are unable to restore an offender will we share the problem with others according to the principles of Scripture. When we violate this goal, we purpose to ask forgiveness knowing that God resists the proud but gives grace to the humble.

Our signatures recognize our accountability to God for each of our words, our awareness of the lasting damage of an untamed tongue, and our commitment to the struggles and rewards of learning to give a good report.

_____ Date _____ _____ Date _____

_____ Date _____ _____ Date _____

_____ Date _____ _____ Date _____

_____ Date _____ _____ Date _____

_____ Date _____ _____ Date _____

_____ Date _____ _____ Date _____

_____ Date _____ _____ Date _____

_____ Date _____ _____ Date _____

Each teacher is asked to keep a "Great" card on their desk in view of all who come into their room, as a reminder to all, of the commitment of the teacher to this principle.

GREAT

GOOD REPORTS EDIFY AND TESTIFY

MATTHEW 18:15

Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou has gained thy brother.

But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established.

GIVING A GOOD REPORT

Each employee is asked to commit themselves to giving only a good report in reference to anyone within the Body of Christ, specifically those associated with Dayton Christian Schools. Each employee will sign the form on the opposite page twice (2) times per year as an indication of their

commitment to this Biblical mandate. (See Matthew 18:15-17, Gal. 6:1, II Thess. 3:14-15).

The Principle of Matthew 18 - that of giving a good report or listening only to a good report, includes, but is not limited to the following:

1. Parent to an administrator or administrator to a parent in reference to a teacher.

2. Teacher to a teacher in reference to the administator, a student, a parent or another teacher.

3. Student to a teacher or administrator in reference to another student (tattle-tale).

4. Teacher to a parent in reference to another teacher, administrator, another parent or student.

5. All reference or evaluation forms in relationship to students without first sharing with student themselves.

6. Other relationships not mentioned above.

7. Teacher to administration in reference to another teacher or student or parent.

In fulfilling this principle, care will need to be taken in discussing students in faculty meetings, remarks placed in permanent record files and the human desire to listen to other students informating you of someone elses mistakes. The only exception is when you are dealing with a *non-Christian*, in that a non-Christian might not understand since the Scriptures have not been revealed to them. Matthew 18:15-17 and Gal. 6:1 deal with fellow Christians.

Language to be used when following Matthew 18 could be as follows:

a. "I always want to be able to give a good report about you, would you please explain *'give concern'*."

b. "Have you talked to the individual involved? I've committed myself to giving and listening to only good reports unless I've been asked to go as a witness according to Matthew 18. If, after you've met with the party involved, you want me to go as a witness, I would be glad to."

The administrator is normally the best individual to be used as a witness.

* * *

SELF-EVALUATION CHECKLIST

It is a good idea for a teacher and/or administrator to take a self inventory of his capabilities periodically. Referral to the previous inventory will show progress and places where progress is still needed.

Name _____ Date _____

How do you rate yourself?

[Boxes for rating scale omitted]

1. Do I pray for students and colleagues consistently?

2. Do I have personal devotions consistently?

3. Am I engaged in Bible study?

4. Am I committing Scripture to memory?

5. Do I have a sensitivity for the lost?

6. Do I teach the needs of home and foreign missions?

7. Am I sensitive to the personal spiritual needs of individual students?

8. Do I bring my students to specific points of decision?

9. Do I apply Biblical principles in the development of attitudes, habits, values?

10. Do I apply Biblical principles in discpline?

11. Do I teach tolerance and compassion for non-Christian and for Christians who hold differing views?

12. Do I encourage students to take an active part in their local churches?

13. Am I a good church member?

14. Do I encourage students to have an outreach through witnessing?

15. Do I prepare Bible lessons well?

16. Are my relationships with my colleagues, students, and parents sincere and open?

17. Do I have a feeling for the spiritual welfare of the school as a whole?

18. Am I concerned about the spiritual level of the graduates and former students?

19. Do I have a vision of Christian education which extends beyond my local school?

20. Do I counsel with parents about the spiritual needs of their children?

21. Does my life evoke enthusiasm among my students for the Christian life and service?

22. Do I correct in myself the same attitudes and actions for which I correct my students and colleagues?

23. Do I meet deadlines imposed on me by those in authority over me?

24. Do I give good reports about my colleagues, parents and students following the Matthew 18 principles?

25. Do I love honestly those under my authority?

26. Do I actively participate in the extra-curricular activities of my student body?

27. Do I faithfully visit the classrooms of my staff members?

28. Do I follow up classroom visits with evaluation meetings?

29. Do I work closely with the PTF to foster the school-home relationship, etc.?

30. Do I take concern, followed by action, in seeing that God's school facilities and property are honoring to Him?

31. Do I contact the home before bringing discipline problems to the attention of the Principal?

32. Do I contact the home when a student is doing poorly in my class?

33. Are the students in my classes orderly and well behaved?

34. Do I seek to meet the individual needs of my students?

35. Do I give homework that has meaning and purpose?

36. Do I give individual help when a student is having difficulty?

37. Am I on time for faculty devotions and meetings?

38. Do I fulfill my assigned supervisory responsibilities?

39. Do I treat all students equally, not giving special favors to "pets"?

40. Do I speak in a kindly tone to the students?

41. Do my pupils and I share the enjoyment of humorous situations?

42. Do I complete all attendance reports and other forms, turning them in on time?

43. Do I enjoy working with young people?

44. Are my explanations to the students very clear?

45. Do my students treat me with respect?

46. Do I provide for the individual differences of my students?

47. Do I set up conferences with students when they wish to talk to me regarding academic or discipline problems?

48. Do I read the daily announcements to my students during the designated period(s)?

49. Do I support student activities by attending athletic, musical, and drama events?

50. Do I keep current in my particular subject area by reading professional journals, attending workshops, or by other means?

51. Do I contact the home to make positive comments about the student?

DAILY SELF CHECKLIST FOR ALL STAFF MEMBERS OF DCS

OUR PURPOSE: To nurture dedicated disciples of our Lord Jesus Christ.

REMEMBER: It takes one to make one. We must establish goals in line with our purpose.

DIRECTIONS: Put check marks ( ) when you have reached the goal. Put a zero (0) when you have not reached the goal.

Daily Goals

Read Word Privately, Prayerfully (minimum 15 minutes)

Write Down (a) Insights from Word
(b) God's promptings

Lessons Well Planned

Record Daily on Chart

Pray for Prayer Partner Daily

Pray for One Student Each Day

Two Positive Calls to Parents Each Week

Other Needed Communication With Parents

Teaching by Precept and By Example
(We must do more of this consciously)

- Eternal Values
- Orderliness
- Humble Service
- Joyfulness
- Respect/Reverence
- Love for People
- Excellence
- Creativity

Principle of Good Report

Faculty Reading Assignment

Weekly "SPECIAL" for Spouse or Someone Else Close

Contact "Witness" Targets

Physical Exercise 2 Times Per Week
(Walk, Jog, Sports, Etc.)

Needed Rest

Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.	Sun.

Plaintiffs' Exhibit 29

April 2, 1977

Mr. C. E. Schindler, Jr.
Dayton Chri. tian Schools
325 Homewood Ave.
Dayton, Ohio 45405

Dear Mr. Schindler:

The Board met April 2nd to review Dr. Ager's letter of March 4th to Mrs. Hoskinson and her reply addressed to the Board, yourself and Dr. Ager.

After very careful and prayerful deliberation, we found all the requests made in Dr. Ager's letter reasonable and in harmony with the Board's philosophy and policies.

We believe Mrs. Hoskinson violated the Chain Of Command principle in distributing her letter to all the members of the Board. In the Board's opinion, seeking forgiveness is in order since her letter casts serious doubt on her continued effectiveness to the school and its philosophy of service to the home. Requirements for continued employment are the responsibility of Dr. Ager and yourself.

We commend your support of Mrs. Hoskinson's many fine qualities as a teacher, but feel she also has some shortcomings. It is our prayer that she will seek to recognize these shortcomings so that her good qualities can be utilized on our staff.

In Christ,

/s/ Carl Davidson
Chairman

cc: Dr. Ager

Plaintiffs' Exhibit 30

April 5, 1977

Mrs. Linda Hoskinson
4487 Bascula Bridge Dr.
Apartment 415
Dayton, Ohio 45440

Dear Linda:

The Board of Directors has met in reference to your letter and their reply is attached. Linda, our only goal is to have a school system that is exactly what our Lord Jesus Christ would want. Obviously that has taken a process of refining in our lives and that process is not finished yet.

We make mistakes and hope that we learn from them as we continue to serve Jesus here at Dayton Christian Schools. I feel that God has blessed you with outstanding qualities as a teacher and hope that this situation will be a learning experience for us all.

If I may, I would like to address myself to the questions raised in your letter to the Board, Dr. Ager and myself. My responses are supported by our Board of Directors.

1) "Where does the Board stand concerning the issue over my telephone?" We are cognizant of the fact that some parents may misuse the liberty they have to contact teachers at any time. However, we do feel that teachers must accept that possible trial in their pursuance of helping the parents educate their child. We view ourselves in a support structure rather than a separate entity. The more we develop a servant spirit, the more available we become to fulfill the wishes of those whom we serve. We find no reason to change the policy of requiring teachers to be available by phone.

2) "Will Dr. Ager's letter be placed in my file?" We keep a file of all correspondence with teachers - all of which is

maintained in confidence. None of this correspondence is ever passed on to other potential employers, etc.

3) "In the Board's eyes, where do I stand as a teacher?" I believe the Board's letter to me dated April 12, 1977, states their position. As for Dr. Ager and myself, we feel that in order to "maintain unity of the Spirit in the bond of peace", we must be transparent with each other. Our only concern is that we can be supportative of each other as we serve Jesus together in His school. You have much to offer, but you must be willing to support the policies and positions of the school.

Linda, we will be delighted to discuss in more detail, if you desire, the points raised in this letter.

In His service,

Claude E. Schindler, Jr.
Superintendent

CES/cn

cc: Dr. Ager, Carl Davidson

Plaintiffs' Exhibit 22

DAYTON CHRISTIAN SCHOOLS, INC.

TEACHER'S CONTRACT

The School Board of Directors appoints you LINDA HOSKINSON as Elementary teacher in the Dayton Christian Schools. Date of employment shall be from Aug. 23, 1978 to June 8, 1979. Remuneration for this period of employment will be $9,412.50. The school will provide fringe benefits as outlined in the attached schedule. Said teacher agrees to abide by the following criteria:

(Please initial each item after reading)

[All items initialed—initials omitted]

1. Your duties will involve not only the responsibilities ordinarily incumbent; but also those responsibilities related to the special spiritual ministry to which you are called — the training of the child in Christian faith and practices. In a very real sense, therefore, it is the expectation of this Board that you will strive at all times to understand, appreciate, and love the pupils entrusted to you for instruction, and that you will, to the best of your ability, provide for their fullest intellectual, physical, emotional, and spiritual development. As a servant of the Lord Jesus Christ, you will *faithfully attend* the regular services of your church as an example of the Believer.

2. The teacher agrees to be present on time for faculty devotions, which begin each school day, and to remain in the building thirty (30) minutes after classes have been dismissed. The teacher also agrees to remain after school for such meetings and conferences as may be called by the Principal or other administrative officer acting in his behalf.

3. The teacher agrees to abide by the regulations set

forth in the Faculty Handbook and to cooperate in every way with the school authorities. The teacher will maintain a quiet, dignified, well-disciplined, and studious classroom, study hall, or work group.

4. The teacher agrees to accept his or her proportionate amount of supervision outside of regular classroom assignment, the extent of such supervision and assignment to be determined by the Principal of the school.

5. The teacher will present certification from a reputable physician showing that he or she has passed a physical examination, including a tuberculin test, taken at a date subsequent to employment.

6. This contract becomes valid upon the filing of the proper teacher's certificate, with the exception as provided in Section 3319.36 of the Revised Code, State of Ohio.

7. A copy of the complete college transcript will be filed in the Principal's office five (5) days prior to the first day of teaching.

8. The teacher agrees to accept, without reservation, the attached Educational Philosophy of Dayton Christian (Please initial each statement of the philosophy indicating your acceptance.)

9. The teacher accepts, without reservation, the attached Statement of Faith and has initialed each statement.

10. The teacher has read the attached job description and agrees to abide by the requirements listed.

11. The teacher will avoid highly debatable topics as much as possible, especially as they relate to denominational issues.

12. The teacher agrees to adhere to I Corinthians 3:16,17 and 6:19,20. We interpret this to mean abstinence in drinking, smoking, and in the use of profane language, etc.

13. The teacher agrees to follow the Biblical pattern of Matthew 18:15-17 and Galatians 6:1 and always give a good report. All differences are to be resolved by utilizing Biblical principles — always presenting a united front.

14. The contract between teacher and Dayton Christian Schools can be voided when any of the above requirements are violated by either party. If after signing the contract, the teacher desires to be excused from said contract, a written request must be made to the Superintendent who will in turn present to the Board for consideration.

15. The contract must be returned by the teacher within twenty (20) days following its receipt.

Entered into this 17th day of April 1978

/s/ Linda V. Hoskinson
Teacher

Chairman, Dayton Christian Schools, Inc.

/s/ Claude E. Schindler
Superintendent

Plaintiffs' Exhibit 23

DAYTON CHRISTIAN SCHOOLS, INC.

STATEMENT OF FAITH

(Please initial each item)

[All items initialed—initials omitted]

1. I believe the Bible to be the inspired and the only infallible authoritative Word of God.

2. I believe that there is one God, eternally existent in three persons: Father, Son, and Holy Spirit.

3. I believe in the diety of our Lord Jesus Christ, in His Virgin birth, in His sinless life, in His miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory.

4. I believe that man is sinful by nature and that regeneration by the Holy Spirit is essential for his salvation.

5. I believe in the continuing ministry of the Holy Spirit, by whose indwelling the Christian is enabled to live a Godly life.

6. I believe in the resurrection of both the saved and the lost. They who are saved unto eternal life and they who are lost unto eternal damnation.

7. I believe in the spiritual unity of believers in our Lord Jesus Christ.

8. I believe in the creation of man by the direct act of God.

Dayton Christian Schools neither supports nor endorses the World Council of Churches, National Council of Churches or any other world, national, or regional organization which gives Christian recognition to unbelievers or which advocates multi-faith union.

Date April 17, 1978

/s/ Linda V. Hoskinson
Signed

Plaintiffs' Exhibit 24

THE EDUCATIONAL PHILOSOPHY OF THE DAYTON CHRISTIAN SCHOOLS

(Please initial each paragraph)

[All items initialed—initials omitted]

The educational philosophy of Dayton Christian Schools is based on a God-centered view of truth and man as presented in the Bible. Since God created and sustains all things through His Son, Jesus Christ, the universe and all life are dynamically related to God and have the purpose of glorifying Him. This is pointedly true of man who was made in God's image, different in kind from all other creation, with the unique capacity to know and respond to God personally and voluntarily. Because man is a sinner by nature and choice, however, he cannot, in this condition, know or honor God in his life. He can do this only by being born again through receiving Jesus Christ as Savior and Lord, and thus be enabled to do God's will, which is the ultimate purpose of his life.

The entire process of education is seen as a means used by the Holy Spirit to bring the student into fellowship with God, to help him become strong or mighty in the spirit, to assist him in developing a Christian mind, to enable him to think God's thoughts, to train him in Christ-likeness, to teach him to act like God and to help the student demonstrate Christ-like character qualities so that he can fulfill God's total purpose for his life personally and vocationally. He is taught the Bible so he may understand God as well as his own true nature and function as God's image. He is developed and related to God as a whole person, that is: spiritually, mentally, physically, and socially. He is taught to see all truth as God's truth and to integrate it with, and interpret it by, God's Word. He is educated as an individual with his own unique abilities and personality who learns to live and work with others at home, in the church and in a changing secular society. He interacts with and is taught by parent and teacher models

who are themselves born again and have this perspective on life.

The authority for such an education comes both from God's command that children be taught to love God and place Him first in their lives and from the fact that parents are responsible for the total education and training of their children. At the parents' request, the Christian school, along with the church, becomes a partner in giving this education. The Christian school is an extension of the local evangelical fundamental church's Christian education program, serving the parent in fulfilling their responsibility of educating the child. From this philosophy stem certain aims and objectives:

I. FOR THE SPIRITUAL AND MORAL GROWTH OF THE STUDENTS, the school seeks:

1. To teach the Bible as God's inspired Word and to develop attitudes of love and respect toward it.

2. To teach the basic doctrines of the Bible. (i.e., God, Jesus Christ, Holy Spirit, Man, Salvation, Church, Scriptures, Satan, Angels.)

3. To lead the pupil to a decision of confessing Christ as Savior and Lord.

4. To develop a desire to know and obey the Will of God as revealed in the Scriptures.

5. To equip the student to carry out the Will of God daily.

6. To impart an understanding of each Christian's place in the church and its worldwide task of witnessing, evangelizing and discipling, and to stimulate the student's involvement in this task.

7. To develop the mind of Christ toward godliness and sin and to teach the students how to overcome sin.

8. To encourage the development of self-discipline and responsibility in the student based on respect for and submission to God and all other authority.

9. To help the student develop for himself a Christian world view by integrating life and studies with the Bible.

II. FOR THE STUDENTS' PERSONAL AND SOCIAL DEVELOPMENT, the schools aims

1. To help the student develop his personality based on a proper understanding and acceptance of himself as a unique individual created in the image of God and on the fullest possible development of his own capabilities.

2. To teach the students to treat everyone with love and respect as unique individuals made in God's image.

3. To make the student a contributing member of his society who realizes his dependence on others and their dependence on him and the need to serve them.

4. To promote an understanding of time as a God-given commodity and the individual responsibility for effective use of time.

5. To show a realistic and Biblical view of life and work, and provide skills for personal relationships and future endeavors.

6. To develop both good and proper attitudes toward marriage and the family and also the understanding and skills needed to establish God-honoring homes.

7. To promote physical fitness, good health habits, and wise use of the body as the Temple of God.

8. To impart the Biblical attitudes toward material things and to encourage individual responsibility of using them for God's glory.

9. To engender an appreciation of the fine arts through the development of the student's understanding and personal expression.

III. ACADEMICALLY, the school endeavors

1. To promote high academic standards within the potential of the individual as uniquely created by God and to help the student realize his full academic potential.

2. To help each student gain a thorough comprehension and command of the fundamental processes used in communicating and dealing with others, such as reading, writing, speaking, listening, and mathematics.

3. To teach and encourage the use of good study habits.

4. To teach the student how to do independent research and to reason logically.

5. To motivate the student to pursue independent study in areas of personal interest.

6. To develop creative and critical thinking and the proper use of Biblical criteria for evaluation.

7. To promote good citizenship through developing the understanding and appreciation of our Christian and American heritages of responsible freedom, human dignity and acceptance of authority.

8. To discuss current affairs in all fields and relate them to God's plan for man.

9. To produce an understanding and appreciation for God's world, an awareness of man's role in his environment and his God-given responsibilities to use and preserve it properly.

IV. WORKING WITH THE HOMES FROM WHICH THE STUDENTS COME, the school desires

1. To bring those whom we find that are not Christians to the saving knowledge of Jesus Christ.

2. To aid families in Christian growth and to help them develop Christ-centered homes.

3. To cooperate closely as servants to the parents in every phase of the student's development, especially as it relates to the school program.

4. To help the parents to understand the school's purpose and program.

5. To assist parents in keeping up with the changing culture and its effect on the home and the implications for their children.

6. To encourage regular attendance and involvement in the local church.

7. To encourage parents to realize and shoulder their responsibility for the spiritual, moral, and social education of their children.

Plaintiffs' Exhibit 34

GIVING A

GOOD REPORT

In obedience to the Word of God, we hereby commit ourselves to the goal of giving a good report. When this is not possible, we purpose to remain silent or to privately go to the person, confirm our goal, and explain the offense that would hinder us from giving a good report. We hereby purpose to approach an offender in a spirit of genuine love having first examined and corrected our own attitudes and actions. Only if we are unable to restore an offender will we share the problem with others according to the principles of Scripture. When we violate this goal, we purpose to ask forgiveness knowing that God resists the proud but gives grace to the humble.

Our signatures recognize our accountability to God for each of our words, our awarenss of the lasting damage of an untamed tongue, and our commitment to the struggles and rewards of learning to give a good report.

/s/ Judy Taulbee Date 10/23/78

/s/ Judy Wetzig Date 10/23/78

/s/ Marcia Hawks Date 10/23/78

/s/ Brenda Rodgers Date 10/23/78

/s/ Susan Walborn Date 10/24/78

/s/ Kay Hunt Date 10/24/78

/s/ Nancy Jensen Date 10/2678

/s/ Bob L. Haynes Date 10/31/78

/s/ Linda V. Hoskinson Date 11/20/78

/s/ Helen Mullins Date 11/29/78

Defendants' ExhibitA
DAYTON CHRISTIAN SCHOOLS, INC.
INTER-OFFICE MEMO

[Legend omitted.] Feb. 20, 1979

TO: Linda Hoskinson

FROM: Jim Rakestraw

SUBJECT:

This letter is written to follow-up our previous conversation regarding you teaching fourth grade at DCS next year. My concern at the time was that as you will be a new parent (June) your teaching next year would be in contrast to the School's philosophy. As a school, we see the importance of the mother being in the home during the early years of child growth.

This is a factor we consider as we interview prospective teachers. If there are pre-school age children in the home we recommend the mother stay there and do not accept her application. In view of this, we are unable to offer you a teaching contract for the upcoming year.

We rejoice with you and Randy as you anticipate the joys of parenthood. We trust God will bless your family richly as you welcome this gift from God into your family.

In Christ,

/s/ Jim Rakestraw

Defendants' Exhibit B
[Letterhead—Legend Omitted]

March 6, 1979

Superintendent C. E. Shindler
Dayton Christian Schools, Inc.
325 Homewood Avenue
Dayton, Ohio 45405

RE: DISCRIMINATORY EMPLOYMENT PRACTICES
LINDA HOSKINSON

Dear Mr. Shindler:

I take this opportunity to inform you that I represent Linda Hoskinson regarding her employment at your School. I specialize in labor relations and discrimination. Based upon a letter dated February 20, 1979 written by Jim Rakestraw (attached) it is quite apparent that discriminatory practices exist.

More specifically, this letter illustrates that but for the fact that she has elected to have a child, she would be employed for the 1979-1980 school year. To preclude my client from further employment on the basis of pregnancy and child rearing constitutes violations of both state and federal discrimination laws.

I am sure that this constitutes merely a misunderstanding and an examination of state and federal law by you will result in the February 20, 1979 letter being retracted and further employment extended to my client. Would you please contact me on or before March 20, 1979 and inform me of the position of the school? Naturally, should you not extend further employment to her on the basis of her pregnancy, we will have no alternative but to explore all state and federal

administrative and court remedies. The choice is yours. I await your response.

Very truly yours,

ROBERT T. DUNLEVEY, JR.

RTDjr/jeg
Enclosure

cc: Linda Hoskins

Plaintiffs' Exhibit 33

DAYTON CHRISTIAN SCHOOLS

BOARD MEETING MINUTES

March 26, 1979

Members present:

1. Dave Riley
2. Gordon Stout
3. Steve House
4. Warren French
5. Don Locker
6. Tom Hockabee
7. Jack Henkle
8. Carlton Mechling
9. Carl Davidson
10.
11.

Ex-Officio members:

Bud Schindler

Guests:

Lee Reno
Lou Damiani
Robert Burkett

* * *

Motion by Warren French, Second by Don Locker: The Board has reviewed the suspension of Mrs. Linda Hoskinson at noon on March 14 and after subsequent meeting on March 15 with Mr. and Mrs. Hoskinson and the Board, has concluded that there is a serious philosophical difference between the Hoskinsons and Dayton Christian Schools. This has been evidenced by violation of paragraph 13, contained in the contract between Linda Hoskinson and Dayton Christian Schools dated April 17. Due to the fact that we do not sense any change on the part of the Hoskinsons, we feel that the Lord must be leading them to some other phase or place of service, therefore we are terminating the services of Linda Hoskinson as of March 26, 1979. Motion passed.

* * *

Plaintiffs' Exhibit D
[Dayton Christian Schools Letterhead omitted]

March 27, 1979

Mrs. Linda Hoskinson
4487 Bascule Bridge Drive
Dayton, Ohio 45440

Dear Linda:

The Board of Directors of Dayton Christian Schools, Inc., met on March 26, 1979, and prayerfully reviewed the suspension administered by myself on March 14, 1979, at 12 noon, and the subsequent hearing before the Board on March 15, 1979.

Our spirits bear witness to the fact that there is a serious philosophical difference between you and Dayton Christian Schools. This has been evidenced by violation of paragraph 13, contained in the contract between you and Dayton Christian Schools, dated April 17, 1978:

> "13. The teacher agrees to follow the Biblical pattern of Matthew 18:15-17 and Galatians 6:1 and always give a good report. All differences are to be resolved by utilizing Biblical principles - always presenting a united front."

Due to the fact that we do not sense any change on your part, we feel that the Lord must be leading you to some other phase or place of service, therefore we are terminating your services as of March 26, 1979. The Scriptures instruct us in Amos 3:3 "Can two walk together except they be agreed?" We consider the violation of the chain of command on two (2) occasions to be a serious breach of unity and further feel that we are not agreed and thus are not in a position to walk together.

We shall lift you and Randy to the throne as you further seek His Will. We are confident that God will use this particular trial to make you more like Jesus.

In His Service,

/s/ Claude (Bud) E. Schindler, Jr.
Superintendent

CES:raf

Plaintiffs' Exhibit 35

Ohio Civil Rights Commission (State or Local Agency) 76032679(02796)0379

Name	Home Telephone Number
Mrs. Linda Hoskinson	513 429-2836
Street Address	
4487 Bascule Bridge Drive	
City, State, and Zip Code	County
Dayton, Ohio 45440	Green

Named is the employer, labor organization, employment agency, apprenticeship committee, state or local government agency who discriminated against me. (If more than one list below).

Name	Telephone Number (Includes area code).
Dayton Christian Schools	513 278-9645
Street Address	City, State, and Zip Code
325 Homewood Avenue	Dayton, Ohio 45405 Montgomery

Name	Telephone Number (Include area code)
Street Address	City, State, and Zip Code

Cause of discrimination based on my (Check appropriate box(es)
☐ Race ☐ Color ☒ Sex ☐ Religion ☐ National Origin
☐ Other (specify) Female (Pregnancy)

Date most recent or continuing discrimination took place (Month, day and year) March 26, 1979

The particulars are:

I. I am a pregnant female and have been employed by the above named Respondent since August, 1974, as a Teacher. On February 20, 1979, I received notice that I would not be offered a teaching contract for the 1979-1980 school year.

II. The reason cited by Respondent, Jim Rakestraw, for my being denied a teaching contract for the upcoming year was the school's belief that during the early years of a child's growth, the mother's place is in the home.

III. I believe I have been discriminated against because of my sex, female, in that:

(a) Respondent stated in writing that they believe a mother's place is at home with her child.

(b) I consulted an attorney who in turn apprised Respondent on March 6, 1979, that what they were doing was discriminatory. On March 14, 1979, I was suspended indefinitely because I had sought outside help.

(c) I was subsequently informed by letter dated March 27, 1979 that my employment had been terminated effective March 26, 1979, because of alleged serious philosophical difference between myself and Dayton Christian Schools.

X I also want this charge filed with the EEOC.
I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Linda V. Hoskinson
3/28/79

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
Signature of Complainant
/s/ Linda V. Hoskinson
Subscribed and sworn to before me this date
(Day, month, and year)
28 March 1979

Notary - (When necessary to meet State and Local Requirements)

Ohio Civil Rights Commission
/s/ Darnell Cox

Plaintiffs Exhibit 36

[Ohio Civil Rights Commission Letterhead omitted]

April 18, 1979

Mr. Bruce Pence
Parks & Logothetis
111 West 1st Street
Dayton, Ohio 45402

Dear Mr. Pence:

Re: Hoskinson vs. Dayton Christian Schools 76032679
(02769)0379 #057790524

This letter will serve to confirm the beginning of a preliminary investigation into the above cited charge. We will be attempting to elicit information which will determine whether the Commission should initiate a full investigation in the matter.

Enclosed is a copy of the Complainant's charge affidavit along with a list of requested documentation that should be compiled as part of the documentation required for the preliminary investigation.

Perhaps your organization will consider adjustment of this matter. If so please incorporate the terms of adjustment in a letter to the Regional Director and forward it to this office within five (5) working days. A sample adjustment letter is enclosed for your consideration. After the Complainant has indicated acceptance of the remedy and the Regional Director has approved the adjustment an executed copy will be returned to your office. The matter will be closed.

Should your organization have any questions in this matter, please direct those inquiries to the undersigned. Your cooperation will be greatly appreciated.

Approved by:

/s/ Rebecca K. Haley,
Regional Director

Respectfully,

/s/ Frank X. Masterson
Intake Specialist

RKH/ FXM/cd
enclosure

Plaintiffs' Exhibit 37
[Ohio Civil Rights Commission Letterhead omitted]

May 14, 1979

Dayton Christian Schools, Inc.
325 Homewood Avenue
Dayton, Ohio 45405

Dear Mr. Schindler:

Re: Linda Hoskinson vs. Dayton Christian Schools, Inc.
76032679(02796)057790574(0379)

In view of the fact that your organization is unable at this time to satisfactorily adjust the above charge, the NSW Regional Office recommended that same be coded for formal investigation.

A Commission Field Representative will contact you when this case is scheduled for investigation. In the meantime we encourage you to reconsider adjustment of this matter in lieu of a potentially costly and time consuming investigation. If you decide to accept the terms upon reconsideration, please incorporate the terms in an adjustment letter and return it signed to this office.

Very truly yours,

/s/ Rebecca K. Haley,
Regional Director

RKH/FXM/cd

/s/ Frank X. Masterson, Jr.
Intake Specialist

Plaintiffs' Exhibit 38
[Ohio Civil Rights Commission Letterhead omitted]

October 24, 1979

Mr. Bruce E. Pence
Parks and Logothetis
111 West First Street
Dayton, Ohio 45402

Re: Linda Hoskinson vs Dayton Christian Schools, Inc.
76032679(02796)0379 - 057790574

Dear Mr. Pence:

This confirms our telephone conversation of October 23, 1979, and our agreement to hold an investigative conference at Respondent's Homewood Avenue facility on subject charge beginning at 10 AM, Friday, November 16, 1979. The witness and document request lists previously mentioned are included here. Please have the requested information available at the time of the conference, if not before. Should you have any questions about the items listed, please get in touch with me for an explanation.

1. EEO/OCRC-53 employment data on Respondent for 1977 to the present. A blank OCRC-53 is enclosed for your convenience.

2. Blank employment application form(s) currently used by Respondent.

3. Employee handbooks and rules and regulations for the period January 1, 1977 to the present.

4. Written Respondent policy on the specific factors and procedures involved in the following for the period January 1, 1977 to the present: disciplinary actions, up to and including discharge; employee pregnancies; oral and written performance evaluations; peformance standards; employees working with pre-school children; contract renewal; em-

ployee grievance procedure; employees resorting to the legal system in grievances with Respondent; determination of "serious philosophical differences"; inquiries into employees' financial status and babysitting plans.

5. Complete job descriptions and model contracts for the teaching position held by Complainant, from January 1, 1977 to the present.

6. A list of all Respondent employees who were pregnant during the period January 1, 1977 to the present, including: name; date of hire; dates of pregnancy; any change in status of employee while pregnant or afterward, including person recommending change (name, sex, title), reason for change.

7. A list of all employees suspended and/or discharged from January 1, 1977 to the present, including: name; sex; date of hire; position(s) held, with dates; date of suspension/discharge; reason for suspension/discharge; person recommending suspension/discharge (name, sex, title).

8. A written position statement regarding each of Complainant's allegations.

9. Minutes of Respondent's Board of Directors meetings for March 15 and 26, 1979.

10. Complete personnel files for Complainant, Arlene Motter, Mike Boyce, Martha Carroll, Mr. and Mrs. Lloyd Davis, Mr. and Mrs. Dan Grable, Ron Pinsenschaum, Robert Burkett, Ella Cuesta, Wanda Johnson, Judy Wetzig, Cheryl Dixon, Tim Heaton, and the others listed in items 6 and 7 above.

Please have the following witnesses available for interview during the investigative conference, or, to expedite the conference, provide their home addresses/telephone numbers so that the Commission may contact them at a later date:

1. Mr. Claude Schindler, Jr.
2. Mr. Jim Rakestraw
3. Mr. Dan Grable
4. Other Respondent witnesses to the items in Complainant's charge and/or Respondent's position statement.

Additional witnesses and/or documents may be needed as the investigation proceeds, especially because Respondent has not yet provided this office with its position statement. You indicated that a position statement would be submitted to this office prior to the on-site conference.

Respondent may wish to make a settlement offer in an attempt to resolve this case before the investigative conference. Should Respondent wish to discuss this option further, please contact me as soon as possible.

Sincerely,

/s/ Jay M. Norris
Field Representative

Approved by:

/s/ Rebecca K. Haley Ross
Regional Director

Enclosure: OCRC-53

RKHR/JMN/mjt

[Enclosure Omitted]

Plaintiffs' Exhibit 39
[Ohio Civil Rights Commission Letterhead omitted]

DISCHARGE

1. X A copy of your latest EEO-1 Report. If you do not report with EEOC an OCRC-53 form is included for your convenience.

2. X A copy of the Complainant's application for employment; and a brief summary of Complainant's job history.

3. X A list of all persons who were discharged for a similar offense during the past year by name, and the name of the person who recommended discharge in each case.

4. X An explanation of your disciplinary procedures used in administering your organization, and how the Complainant was treated under those procedures.

5. X Copies of any disciplinary notices that Complainant has received since the time of her hire.

6. X A position statement from your organization concerning Complainant's physical condition; if and how it has affected her job performance and capabilities; and if any efforts were made to reasonable accommodate Complainant. Please answer each of Complainants allegations and provide supportive documentation for same.

Plaintiffs' Exhibit 40
[Ohio Civil Rights Commission Letterhead omitted]

January 28, 1980

Mr. Bruce E. Pence
Parks and Logothetis
111 West First Street
Dayton, Ohio 45402

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

76032679(02796)0379-057790574

RE: Linda Hoskinson vs Dayton Christian Schools, Inc.

Dear Mr. Pence:

This is to notify you that after its preliminary investigation of the above matter, the Ohio Civil Rights Commission has determined that it is probable that you or your organization has engaged in unlawful discrimination practices. A copy of the Commission's determination is enclosed for your review.

Pursuant to Revised Code Section 4112.05(B) and Rule 4112-3-03(B) of the Commission's Rules and Regulations, the enclosed proposed Conciliation Agreement and Consent Order has been prepared to eliminate unlawful discriminatory practices and their efforts and to assure your voluntary compliance with Ohio's Laws Against Discrimination.

So that we may discuss this proposal we suggest that you meet in this regional office on either February 6, 1980 at 10:00 am, or February 8, 1980 at 10:00 am. Please call me and confirm the date most convenient for you.

Your refusal to meet with us as suggested, or at another time mutually agreed, or your failure to respond to the Commission within ten (10) days from the date of this letter

shall result in a determination being made by the Commission that conciliation efforts have failed. Such a failure will require the Commission to initiate formal proceedings against you or your organization.

Very truly yours,

/s/ Rebecca K. Haley Ross
Regional Director

Enclosures
RKRH/mjt
cc: Robert Brown
Executive Director

Plaintiffs' Exhibit 41

STATE OF OHIO
CIVIL RIGHTS COMMISSION

PROBABLE CAUSE-Approve Conciliation Agreement and Consent Order

NOTICE OF COMMISSION DETERMINATION

LINDA HOSKINSON Complainant	DAYTON CHRISTIAN SCHOOLS, INC. Respondent
4487 Bascule Bridge Drive, Apt. 415 Address	325 Homewood Avenue Address
Dayton, Montgomery, Ohio City	Dayton, Montgomery, Ohio City

76032679 (02796) 0379 057790574
Case No.

I.

SUMMARY OF COMPLAINANT'S ALLEGATIONS

LINDA HOSKINSON, a pregnant female, filed a charge with the North Southwest Regional office of the Ohio Civil Rights Commission on March 28, 1979, alleging discrimination in the terms and conditions of her employment against Respondent due to her sex. A charge was subsequently filed with the Equal Employment Opportunity Commission on April 3, 1979. An alleged violation took place on March 26, 1979. Complainant asserts:

1. She has been employed by Respondent since August, 1974 as a teacher.

2. On February 20, 1979, she received a written notice from *Jim Rakestraw*, her principal, that she would not be offered

a teaching contract for the 1979-1980 school year, because the Respondent believed that during the early years of a child's growth, the mother's place is in the home.

3. She consulted an attorney who in turn apprised Respondent on March 6, 1979, that what they were doing was discriminatory. On March 14, 1979, she was suspended indefinitely because she had sought outside help.

4. She was subsequently informed by letter dated March 27, 1979 that her employment had been terminated effective March 26, 1979, because of alleged philosophical difference between herself and Respondent.

5. She believes she has been discriminated against because of her sex.

II.
SUMMARY OF RESPONDENT'S POSITION

Respondent's representatives *Claude E. Schindler, Jr.*, Superintendent, *James Rakestraw*, Assistant to the Superintendent, and *Bruce E. Pence*, Attorney, denied Complainant's allegations and provided the following information:

1. Respondent agrees with the wording of Complainant's first allegation, but asserts that it's a religious institution and therefore not subject to the jurisdiction of the Ohio Civil Rights Commission or the Equal Employment Opportunity Commission in this case.

2. Respondent basically agrees with the wording of Complainant's second allegation, adding that it believes that the preschool child should be at home supervised by the parents. The February 20, 1979 written notice was subsequently rescinded. The school does not have a written employee policy on pregnancy or preschool child care - it is in the process of development now.

3. Respondent agrees with Complainant as to the dates and reason for suspension (with pay) given in Complainant's third allegation. Complainant did not discuss her intention to see an attorney with Mr. Schindler or Mr. Rakestraw in advance in violation of her contract. This was not the first time she violated Respondent's chain of command.

4. Respondent agrees that it issued the letter mentioned in Complainant's fourth allegation, and states that Complainant was discharged for breach of her teaching contract in not following the Biblical chain of command.

5. Complainant was not discriminated against because of her sex.

III.
FINDINGS OF FACT

Based on the facts and allegations before it, the Ohio Civil Rights Commission finds that:

1. Evidence indicates that Complainant and Respondent entered into teaching contracts for Complainant's services spanning the period August 26, 1974 through June 8, 1979. Evidence does not indicate that the Ohio Civil Rights Commission lacks jurisdiction over Respondent because it is a religious institution.

2. Evidence and testimony indicate that Jim Rakestraw, then Complainant's principal, on February 20, 1979 issued her a memo which states that Respondent could not offer her a teaching contract for the 1979-1980 school year because Respondent does not accept teacher applications from mothers with pre-school age children in the home, and because Complainant would be a new parent in June, 1979. Evidence and testimony also indicate that on the advice of legal counsel, Claude Schindler, Jr., Respondent's Superintendent, issued Complainant a letter dated March 27, 1979 which rescinded the February 20, 1979 memo. Evidence and testimony indicate that

as of March 27, 1979 and since, Respondent has not had a written employee policy with respect to pregnancy and care of pre-school age children, but that such a policy is currently under study.

3. Evidence and testimony indicate that on March 6, 1979, Complainant's attorney, Robert Dunlevey, Jr., sent a letter to Mr. Schindler alleging discriminatory practices against Respondent based on the February 20, 1979 memo from Mr. Rakestraw, and suggesting that the attorney would "explore all state and federal administrative and court remedies" should Respondent not retract the February 20 memo and extend to Complainant a contract for the 1979-1980 school year. Testimony indicates that Complainant was indefinitely suspended by Mr. Schindler, with pay, as of March 14, 1979, because she had sought outside help. Evidence does not prove Respondent's contention that Complainant's action in seeking the advice of an attorney was a violation of her teaching contract. The other alleged Complainant violation of Respondent's alleged "chain of command policy", according to the Respondent, dates back to March of 1977. Evidence indicates that the contract provisions upon which Respondent rests its case in the 1979 incident were not a part of Complainant's contract in March of 1977. Evidence indicates that Respondent does not have a written or clear "chain of command" policy. Evidence indicates that no disciplinary action was taken against Complainant for the March, 1977 incident, and that there are several other substantial differences between the 1977 and 1979 situations so as to make tenuous any justification Respondent might make of its 1979 actions based on the 1977 incident.

4. Evidence and testimony indicate that Complainant was notified by Mr. Schindler in a letter dated March 27, 1979 that Respondent terminated her employment effective March 26, 1979. "A serious philosophical difference" between Complainant and Respondent was cited in this letter, "evidenced by violation of paragraph 13" of Complainant's contract and "violation of the chain of command on two (2) occasions."

5. Evidence and testimony indicate that but for the fact that Complainant is female and selected to have a child, she would have been offered a teaching contract for the 1979-1980 school year. Evidence and testimony also indicate that Complainant's discharge, and the reasons given for it by Respondent, were directly linked to the February 20, 1979 memo which stated that she would not be offered a contract because "If there are pre-school age children in the home we recommend the mother stay there and do not accept her application." Evidence and testimony indicate that Complainant would not have been thus treated had she been a male, and that, therefore, she has been discriminated against because of her sex.

IV.
DETERMINATION

As a result of the foregoing, the Ohio Civil Rights Commission has determined that it is probable that unlawful discriminatory practices have been or are being engaged in by Respondent in violation of Chapter 4112, Ohio Revised Code.

January 28, 1980 — /s/ Rebecca K. Haley Ross
Date — REGIONAL DIRECTOR

Plaintiffs' Exhibit 42
[Ohio Civil Rights Commission Letterhead omitted]

February 13, 1980

Mr. Bruce E. Pence
Attorney at Law
Parks and Logothesis
111 West First Street
Dayton, Ohio 45402

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Re: Linda Hoskinson vs Dayton Christian Schools, Inc. -
76032679(02796)0379-057790574

Dear Mr. Pence:

On January 28, 1980, you were notified that after its preliminary investigation of the above matter, the Ohio Civil Rights Commission had determined that it is probable that the Respondent has engaged in unlawful discrimination practices. A copy of the Commission's determination was enclosed for your review.

Pursuant to the Commission's Rules and Regulations, the Conciliation Agreement and Consent Order was enclosed with the other January 28, 1980 correspondence. The dates of February 6, 1980 at 10:00 a.m. or February 8, 1980 at 10:00 a.m. were suggested as possible dates to meet in the NSW office to discuss the proposal. As of today's date you have not responded to this correspondence; you did not show up for either of the suggested dates and you have not called to reschedule a date for informal conciliation endeavors.

Section 4112.05(B) in part states:

> ....If it determines after such investigation that it is probable that unlawful discriminatory practices have been or are being engaged in, it shall endeavor to eliminate such practices by informal methods of conference, conciliation, and persuasion....

Your refusal to meet with us as suggested, or at another time mutually agreed, or your failure to respond to this letter within ten (10) days from the date of this letter shall result in a determination being made by the Commission that conciliation efforts have failed. Such a failure will require the Commission to initiate formal proceedings against you or your organization. Pursuant to Section 4112-3-05 of the Commission's Rules; "after the Commission determines that it is probable that any unlawful discriminatory practices have been or are being engaged in against Complainant or others and after the Commission fails to effect the elimination of such unlawful discriminatory practices by conciliation, the Commission shall issue and cause to be served upon all parties thereto or their attorneys of record, if any, a complaint confirming a notice of hearing before a hearing examiner."

I look forward to hearing from you within the next ten (10) days, so we can schedule a mutually agreeable date to conduct a conciliation conference. Your anticipated cooperation in this matter is appreciated.

Very truly yours,

/s/ Rebecca K. Haley Ross
NSW Regional Director

RKHR/mjt

Plaintiffs' Exhibit 43
[Ohio Civil Rights Commission Letterhead omitted]

IN THE MATTER OF

DAYTON CHRISTIAN SCHOOLS, INC.	)	NO. 76032679
325 Homewood Avenue	)	(02796) 0379
Dayton, Montgomery, Ohio	)	057790574

CONCILIATION AGREEMENT AND CONSENT ORDER
I
CONSENT ORDER

A. In accordance with the Ohio Revised Code Chapter 4112, this proposed CONCILIATION AGREEMENT and CONSENT ORDER is made between the Ohio Civil Rights Commission (hereinafter referred to as the "Commission") and DAYTON CHRISTIAN SCHOOLS, INC., for itself (hereinafter referred to as the "Designated Respondent"), under these or any other names and for the Designated Respondent's heirs, representatives, officers, agents, employees, successors, or assigns, through any corporate or other device, and persons acting at the direction of, or in active concert or participation with, any of them (hereinafter collectively referred to as "Respondent). This proposed CONCILIATION AGREEMENT and CONSENT ORDER between the Commission and Respondent, parties hereto, is designed to eliminate any alleged unlawful discriminatory practices, and/or the continuing effects thereof, and assure voluntary compliance with the provisions of the Ohio Laws Against Discrimination as set forth in the Ohio Revised Code Sections 4112.01 - 4112.11, inclusive. As used herein, "Successor" shall include any person or group of persons who in the future may act as owner, manager, or agent for any facility which, at the time this ORDER is entered, is owned, managed, or controlled by Respondents, unless such successor proves by the preponderance of the evidence that: (1) such operation, ownership, management, or control was transferred in a bona fide arms' length transaction; and (2) the successor has never been subject to a Commission Order, and has never been an

officer, director, employee, or agent of a respondent against which such an order has been issued.

B. IT IS UNDERSTOOD BY THE PARTIES THAT THIS INSTRUMENT IS A PROPOSED ORDER AND SHALL HAVE NO FORCE OR EFFECT WHATSOEVER UNTIL EXECUTED BY THE DESIGNATED RESPONDENT OR ITS DULY AUTHORIZED REPRESENTATIVES AND COUNTERSIGNED BY A COMMISSIONER OF THE OHIO CIVIL RIGHTS COMMISSION. WHEN DULY EXECUTED AS SET FORTH ABOVE, THIS PROPOSED ORDER SHALL BE DEEMED AND CONSTRUED AS A *CONCILIATION AGREEMENT* AS PROVIDED BY SECTION CR-5.06 OF THE COMMISSION RULES AND REGULATIONS, AS A *FINAL ORDER* PURSUANT TO SECTION 4112.06 OF THE OHIO REVISED CODE, AND AS *LAWFUL ORDER* PURSUANT TO SECTIONS 4112.11 and 4112.99 OF THE OHIO REVISED CODE AND TO CR-5.06 AND CR-19.02 OF THE COMMISSION RULES AND REGULATIONS, AND SHALL BE IN FULL FORCE AND EFFECT IMMEDIATELY UPON NOTIFICATION TO THE DESIGNATED RESPONDENT OF THE COMMISSION'S APPROVAL AND EXECUTION THEREOF FOR THE PERIOD OF TIME SPECIFIED HEREIN.

C. Respondent shall comply with the aforementioned provisions of the Ohio Revised Code. The matters cited herein shall not exempt Respondent from any other obligations imposed by law. Nothing contained herein shall relieve Respondent of legal responsibility for acts committed by Respondent's employees or agents.

D. The Respondent agrees and stipulates that the Commission has full and complete jurisdiction of the parties and subject matter herein. The Respondent intends to be legally bound by this Order.

E. Nothing in this proposed CONCILIATION AGREEMENT and CONSENT ORDER shall be interpreted as an admission by the Respondent of a violation of Ohio Revised Code Section 4112.01 - 4112.08. The Respondent denies all discriminatory practices. However, the parties hereto desire to avoid the

further expenses and delay which would be occasioned by the continuation of administrative proceedings and the holding of a full evidentiary hearing in this matter, and desire to formulate a plan of affirmative action which will tend to assure equal *employment* opportunities for all persons. Public hearings in this matter is hereby waived. Now, therefore, the Ohio Civil Rights Commission and the Respondent agree to the entry of the following CONCILIATION AGREEMENT and CONSENT ORDER, hereinafter designated PROPOSED ORDER.

II.
OTHER RELIEF

A. Respondent agrees to immediately reinstate Complainant, Linda V. Hoskinson, as an employee in good standing with the restoration of all rights, benefits, and privileges of employment as an elementary school teacher.

B. Respondent will reimburse Complainant the amount of backpay which she would have received had she not been terminated. The amount to be paid shall include interest on the base salary, computed at 6% per year. Such back pay will include comparable raise increments as accorded to other school teachers of Complainant's tenure. All monies earned by Complainant in the interim period since her termination shall be deducted from the gross amount owed to Complainant.

C. Respondent will not write or discuss this case in any reference concerning Complainant. Respondent additionally agrees to expunge from Complainant's record any and all documents and entries relating to the facts and circumstances which led to the filing of the charge of discrimination and the related events occurring thereafter.

D. Respondent agrees not to engage in or allow any of its employees to engage in any conduct against Complainant or any party to or participant in these proceedings the nature of which conduct might be construed as retaliatory.

E. Respondent will not discharge Complainant without just cause. Respondent will submit to the North Southwest Regional Office of the Commission, copies of any warnings or reprimands given to Complainant during the next one (1) year, and will also notify said office if Complainant is discharged for any reason within the period of one (1) year.

F. Respondent agrees to implement and administer the policies and work rules of the school equally without regard for the employees' handicap, race, sex, religion, age, color, national origin or ancestry.

G. Respondent shall post in a conspicuous place or places on its premises, the Commission's mandatory notice which sets forth excerpts of Chapter 4112, Ohio Revised Code, and other relevant information.

H. Respondent shall not seek information regarding race, color, religion, age, sex, national origin, handicap or ancestry on its form of application, unless a bona fide occupational qualification is certified in advance by the Commission.

I. Respondent shall make clear in its employment contracts that employees may contact the Commission if they believe they are being discriminated against at any time because of handicap, race, sex, religion, age, color, national origin or ancestry.

J. Respondent agrees to establish specific guidelines for employee pregnancy and home child care, to notify all employees in writing of this policy, and to furnish the Commission's North Southwest Regional Office, within sixty (60) days from the date of ratification of this agreement, proof of compliance with this provision.

K. Not later than thirty (30) days after the effective date of this conciliation agreement and consent order, an authorized officer of the designated Respondent will furnish the North Southwest Regional Office of the Commission a certified check,

made to the order of Complainant, for the full amount of backpay stipulated in paragraph II (b) supra.

ENFORCEMENT

Respondent acknowledges that pursuant to CR-5.06 -5.08 and CR-19.02 the Commission may conduct such compliance reviews during Respondent's normal business hours as the Commission believes to be warranted during the three (3) years subsequent to the issuance of this PROPOSED ORDER. Respondent agrees to furnish whatever information is required by the Commission in order to implement such reviews, and understands that upon failure to fully comply with any of the terms and conditions of this PROPOSED ORDER the Commission may initiate further action including, but not necessarily limited to, the filing of a complaint for enforcement of this ORDER in an appropriate Court of Common Pleas.

_____ THE OHIO CIVIL RIGHTS COMMISSION

BY _____ BY _____
COMMISSIONER

TITLE _____

DATE _____ DATE _____

This document shall be effective as of the date it is ratified by a Commissioner of the Ohio Civil Rights Commission.

Plaintiffs' Exhibit 44
[Ohio Civil Rights Commission Letterhead omitted]

March 19, 1980

Mr. Bruce E. Pence
Attorney at Law
Parks and Logothesis
111 West First Street
Dayton, Ohio 45402

Re: Linda Hoskinson vs Dayton Christian Schools, Inc. - 76032679(02796)0379-057790574

Dear Mr. Pence:

This is to advise you that conciliation efforts have failed in the subject case and the Commission's NSW Regional Office is preparing to impasse same to the Attorney General's Office for public hearing. Should you in the future desire to make a counter offer which is similar in content to the proposed Commission Conciliation Agreement and Consent Order, the Commission will be willing to review such offer.

Sincerely,

/s/ Rebecca K. Haley Ross
Regional Director

RKHR/yyd

Plaintiffs' Exhibit 45
[Ohio Civil Rights Commission Letterhead omitted]

IN THE MATTER OF: COMPLAINT AND NOTICE OF HEARING NO. 3477

Dayton Christian Schools, Inc.
325 Homewood Avenue
Dayton, Montgomery, Ohio

COMPLAINT

The Ohio Civil Rights Commission (hereinafter Commission) states for its claim for relief:

1. Dayton Christian Schools, Inc. (hereinafter Respondent) is a non-profit organization duly qualified to conduct business in the State of Ohio, and it maintains an office and place of business in the City of Dayton, Montgomery County, Ohio.

2. Respondent is an "employer" as defined by Revised Code Section 4112.01(B).

3. A charge was filed with the Commission by Linda Hoskinson pursuant to and in accordance with Revised Code Section 4112.05(B), on March 28, 1979.

4. That the Commission conducted and completed its preliminary investigation pursuant to and in accordance with Revised Code Section 4112.05(B), which disclosed or tended to show the following facts:

A. Linda Hoskinson is a female who was pregnant.

B. Prior to March 26, 1979 Respondent failed and refused to offer Linda Hoskinson a teaching contract for the 1978-1980 school year allegedly because Respondent believes that the preschool child should be at home supervised by the parents.

C. That prior to March 26, 1979 Respondent suspended Linda Hoskinson indefinitely with pay allegedly because she solicited outside help through the assistance of her Attorney which constituted an alleged violation of Respondent's "chain of command" policy.

D. That on or about March 26, 1979 Respondent discharged Linda Hoskinson allegedly for breach of her teaching contract in not following the Biblical chain of command.

E. That but for the fact that Linda Hoskinson was a female and chose to bear a child, Respondent would have offered her a teaching contract for the upcoming school year and retained her in its employ.

F. That Respondent discharged Linda Hoskinson for reasons not applied equally to all persons without regard to their sex.

5. That as the result of its preliminary investigation, the Commission determined on January 15, 1980, that it is probable that unlawful discriminatory practices have been or are being engaged in by the Respondent in violation of Revised Code Section 4112.02(A) and (I).

6. That the Commission has endeavored to eliminate such practices by informal methods of conference, conciliation and persuasion, and has been unable to do so by such methods.

IN THE MATTER OF

Dayton Christian Schools, Inc.

A public hearing in this matter will be held in Montgomery County at The Commission's North-Southwest Re-

gional office located at Suite 800, Miami Valley Tower, 40 W. Fourth Street, Dayton, Ohio on August 7, 1980 at 9:00 A.M., before one or more Commissioners or a hearing examiner to be appointed by the Commission.

Respondent has a right to Answer this Complaint, and such Answer must be filed in quadruplicate with the Commission at its Central Office, 220 Parsons Avenue, Columbus, Ohio 43215, within 28 days of service of this Complaint and Notice of Hearing. Respondent must also file one copy of its Answer with Counsel for the Commission, Don Conley, Assistant Attorney General, Civil Rights Section, LeVeque-Lincoln Tower, 50 West Broad Street, 17th Floor, Columbus, Ohio 43215, (614) 466-7900.

This Complaint and Notice of Hearing issued this 18th day of April, 1980.

/s/ RONALD C. MORGAN, CHAIRPERSON

/s/ CLINGAN JACKSON, COMMISSIONER

THADDEUS A. GARRETT, JR., COMMISSIONER

/s/ WADE H. FRANKLIN, III, COMMISSIONER

THOMAS A. BROWN, COMMISSIONER

CERTIFICATE

I, Gerald P. Wolfe II, Compliance Manager of the Ohio Civil Rights Commission, do hereby-certify that the foregoing is a true copy of the Complaint and Notice of Hearing issued against Dayton Christian Schools, Inc., 325 Homewood Avenue, Dayton, Montgomery, Ohio, and has been filed with the Commission's Central Office in Columbus, Ohio.

April 18, 1980 /s/ Gerald P. Wolfe II
Compliance Manager

Plaintiffs' Exhibit 46

STATE OF OHIO
CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

THE OHIO CIVIL RIGHTS COMMISSION	:	CASE NO. 3477
(Commission)	:	
and	:	
DAYTON CHRISTIAN SCHOOLS, INC.	:	**ANSWER**
(Respondent)	:	

Now comes Dayton Christian Schools, Inc., hereinafter called DCS, and answers the Complaint and Notice Of Hearing as follows:

FIRST DEFENSE

(1) DCS is a religious institution composed of people of the Christian persuasion who are members of the Body of Jesus Christ and bound by the Word of God. This institution was established in obedience to God's Word, namely: To train children in the nurture and admonition of the Lord (Ephesians 6:4).

(2) The mission of DCS is to promote the Christian faith and to provide Christian educational opportunities to all those seeking a Christian education.

(3) The Commission may not assert jurisdiction over religious institutions. It is a violation of the First and Fourteenth Amendments of the United States Constitution and Article I, Section 7 and Article XII of the Constitution of the State of Ohio for the Ohio Civil Rights Commission to regulate religious institutions.

SECOND DEFENSE

(4) DCS incorporates in this its Second Defense all of the admissions, denials and allegations contained in its First Defense as if fully set forth herein.

(5) DCS admits the allegations contained in Paragraphs 1, 3 and 4(A) of the Complaint.

(6) DCS denies the allegations contained in Paragraphs 2, 4(B), 4(C), 4(D), 4(E), 4(F), 5 and 6 of the Complaint.

(7) DCS generally and specifically denies each and every allegation of the Complaint not specifically admitted or modified herein.

Respectfully submitted,

PARKS AND LOGOTHETIS

/s/ Bruce E. Pence

/s/ Bruce E. Pence
Attorney for Respondent
111 West First Street - Suite 1100
Dayton, Ohio 45402
(513) 461-5310

CERTIFICATE OF SERVICE

I do hereby certify that an original and three (3) copies of this Answer has been mailed by regular U.S. Mail to the Ohio Civil Rights Commission at its Central Office, 220 Parsons Avenue, Columbus, Ohio, 43215 and a copy of this Answer has been mailed by regular U.S. Mail to Don Conley, Assistant Attorney General, Civil Rights Section, LeVeque-Lincoln Tower, 50 West Broad Street, 17th Floor, Columbus, Ohio, 43215, to the Ohio Civil Rights Commission North S.W. Regional Office, 800 Miami Tower, 40 West 4th Street, Dayton, Ohio, 45402, to Robert T. Dunlevey, Attorney for Linda V. Hoskinson, 1401 Talbott Tower, Dayton, Ohio, 45402, and to Linda V. Hoskinson, 4487 Bascule Bridge Drive, Apt. #415, Dayton, Ohio 45440, on this 20th day of May, 1980.

PARKS AND LOGOTHETIS

/s/ Bruce E. Pence

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION, DAYTON, OHIO

DAYTON CHRISTIAN SCHOOLS, INC.
325 Homewood Avenue
Dayton, Ohio 45405

and

PATTERSON PARK CHURCH
708 Shadowlawn Avenue
Dayton, Ohio 45419

and

CHRISTIAN TABERNACLE
51 Best Street
Dayton, Ohio 45405

and

CLAUDE E. SCHINDLER, JR.
1959 Oakcraft Circle
Dayton, Ohio 45440

and

STEPHEN T. HOUSE, M.D. and his Wife, CAMILLIA HOUSE
2406 Fox Run Road
Centerville, Ohio 45459

and

CASE NO. C-3-80-410

Verified Complaint

PAUL PYLE
2020 Colton Drive
Dayton, Ohio 45420

Plaintiffs

-vs-

OHIO CIVIL RIGHTS COMMISSION
220 Parsons Avenue
Columbus, Ohio 43215

and

RONALD C. MORGAN,
Commissioner and Chairperson
Ohio Civil Rights Commission
220 Parsons Avenue
Columbus, Ohio 43215

and

CLINGAN JACKSON,
Commissioner
Ohio Civil Rights Commission
220 Parsons Avenue
Columbus, Ohio 43215

and

WADE FRANKLIN, III.,
Commissioner
Ohio Civil Rights Commission
220 Parsons Avenue
Columbus, Ohio 43215

and

THOMAS A. BROWN,
Commissioner
Ohio Civil Rights Commission
220 Parsons Avenue
Columbus, Ohio 43215

and

THADDEUS A. GARRETT, JR.,
Commissioner
Ohio Civil Rights Commission
220 Parsons Avenue
Columbus, Ohio 43215

and

ROBERT D. BROWN,
Executive Director
Ohio Civil Rights Commission
220 Parsons Avenue
Columbus, Ohio 43215

and

REBECCA K. HALEY ROSS,
Regional Director
North S.W. Regional Office
800 Miami Valley Towers
40 West 4th Street
Dayton, Ohio 45402

and

WILLIAM J. BROWN
Attorney General
State of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

and

KEITH S. MESIROW and
DONALD CONLEY,
Assistant Attorney Generals
Civil Rights Section
LeVeque Lincoln Tower
17th Floor
50 West Broad Street
Columbus, Ohio 43215

Defendants

JURISDICTION AND VENUE

(1) This is a civil action seeking declaratory relief, injunctive relief and other equitable relief. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights guaranteed by the Constitution of the United States. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331 and 1343; 42 U.S.C. §1983; 28 U.S.C. §§2201 and 2202. The matter in controversy exceeds the sum of ten thousand dollars ($10,000.00), exclusive of interest and costs.

(2) This action seeks a declaratory judgment declaring that the enforcement of the Ohio Civil Rights Act, Ohio Revised Code Sections 4112.01 - 4112.99, inclusive, against religious institutions, i.e., christian schools and churches, is a violation of the First, Ninth and Fourteenth Amendments of the Constitution of the United States. This action further seeks a preliminary and a permanent injunction enjoining the Defendants, their officers, agents, successors, employees, attorneys, assigns and other representatives, and all those acting in concert with them and at their direction, from intermeddling with, coercing, intruding upon, or becoming entangled in the Plaintiffs' free exercise and establishment of their religious beliefs.

(3) The unconstitutional acts alleged herein were and are being committed within the Southern District of the State of Ohio.

PARTIES

PLAINTIFFS

(4) Plaintiff, Patterson Park Church is an independent fundamental bible believing and bible teaching church located in Dayton, Ohio. An integral part of the ministry of the church is to spread the gospel of Jesus Christ through its support of Christian education.

(5) Plaintiff, Christian Tabernacle is an independent fundamental bible believing and bible teaching church located in Dayton, Ohio. An integral part of the ministry of the church is to spread the gospel of Jesus Christ through its support of Christian education.

(6) Both Plaintiff churches are supported solely out of the free will offerings of its religious supporters and receive no local, state or federal tax support.

(7) Patterson Park Church formed and operated an elementary church school known as Dayton Christian School, Inc. Christian Tabernacle formed and operated a church high school known as Christian High School, Inc. On February 25, 1971, the two church schools were consolidated into Dayton Christian Schools, Inc.

(8) Plaintiff, Dayton Christian Schools, Inc., hereinafter called "DCS", is a religious institution which operates three (3) campuses in Dayton, Ohio. The purposes for which DCS exists are as follows:

A. To provide for the students and faculty a classroom and campus environment commensurate with an

institution having ultimate objectives which are Christ-centered, truly patriotic, and in obedience to God's Word.

B. To teach all subjects in a manner to create in each student an awareness of God's supreme authority over all creation.

C. To present the Bible, God's Word, as the only reliable and true revelation of God's nature and His redeeming purpose and will for mankind.

D. To teach that the Lord Jesus Christ is the Son of God who came to earth to die for our sins.

E. To train and prepare youth to make worthy contributions to the cause of Christ in the home, church and community.

F. To help each student aspire to positions of responsibility in full or part-time Christian service, wherever that call for service may be.

G. To own, and/or lease, and maintain real property, buildings, and other facilities and property.

H. To do any and all things necessary or incident to the accomplishment of any and all of the purposes.

(9) DCS has a Constitution which contains the following Preamble and Statement of Faith:

PREAMBLE

We, the undersigned, people of Christian persuasion and members of the Body of Jesus Christ, bound by the Word of God, have hereby set forth and adopted the following articles for the establishment, operation and control of a non-profit corporation, Dayton Christian

Schools, Inc. The Corporation will provide an educational curriculum of the highest possible standards in order to prepare the student for purposeful Godliness in any vocation or entrance into institutions of higher learning. Further, as a regular part of the curriculum of the school(s) of the Corporation, each student will be taught Christian doctrine based on the Bible as the textbook authority for such instruction and learning.

This we do in obedience to God's Word, namely: to train children in the nurture and admonition of the Lord (Ephesians 6:4). Further, we recognize the necessity for the moral and spiritual development of our youth through Christian education in harmony with the Holy Bible.

STATEMENT OF FAITH

Each member of the Board of Directors and each member of the educational staff of the Corporation having accepted Jesus Christ as personal Savior, shall subscribe annually in writing to the following statement of Faith:

1. I believe the Bible to be the inspired and the only infallible authoritative Word of God.

2. I believe that there is one God, eternally existent in three persons: Father, Son and Holy Spirit.

3. I believe in the deity of our Lord Jesus Christ, in His Virgin Birth, in His sinless life, in His Miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory.

4. I believe that man is sinful in nature and that regeneration by the Holy Spirit is essential for his salvation.

5. I believe in the continuing ministry of the Holy Spirit, by whose indwelling the Christian is enabled to live a Godly life.

6. I believe in the resurrection of both the saved and the lost. They who are saved unto eternal life and they who are lost unto eternal damnation.

7. I believe in the spiritual unity of believers in our Lord Jesus Christ.

8. I believe in the creation of man by the direct Act of God.

(10) Plaintiff, Claude E. Schindler, Jr., is the superintendent of DCS. He is a citizen of the United States and a resident of the State of Ohio. He is a "born again" Christian and has accepted the call to bear witness to the Lord Jesus Christ and to spread the Christian gospel through the ministry of Christian education. This he does because of his firm religious convictions and in obedience to God's will.

(11) Plaintiffs, Stephen T. House, M.D. and his Wife, Camillia House are citizens of the United States and residents of the State of Ohio. They are the parents of Bret, age 13; Douglas, age 8; and Chris, age 5, all of whom are enrolled as students in DCS. Stephen and Camillia House are "born again" Christians who believe that they have a duty to rear their children to know the teachings of the Bible as the infallible Word of God and to follow Jesus Christ as their personal Savior in their daily lives. Because of these firm religious convictions and in obedience to God's Word, they have enrolled their children in DCS.

(12) Plaintiff, Paul Pyle, is a teacher at DCS. He is a citizen of the United States and a resident of the State of Ohio. He is a "born again" Christian and has accepted the call to bear witness to the Lord Jesus Christ and to spread the Christian gospel through the ministry of Christian education. This he does because of his firm religious convictions and in obedience to God's will.

DEFENDANTS

(13) Defendant, Ohio Civil Rights Commission, hereinafter called "OCRC", is an agency of the State of Ohio created in accordance with the Ohio Revised Code, Chapter 4112, *et seq*. Defendants, Ronald C. Morgan, Clingan Jackson, Wade Franklin, III., Thomas A. Brown and Thaddeus A. Garrett, Jr. are Commissioners of the OCRC. Robert D. Brown is the Executive Director of the OCRC. Rebecca K. Haley Ross is the Regional Director for the North SW Regional Office of the OCRC in Dayton, Ohio. William J. Brown is the Attorney General of the State of Ohio. Keith S. Mesirow and Donald Conley are Assistant Attorney Generals for the State of Ohio assigned to the Civil Rights Section.

(14) Each Defendant is sued individually and in his official capacity. Relief is sought against all defendants jointly and severally as well as their agents, assistants, successors, employees, attorneys and all persons acting in concert with them or at their direction. All Defendants are presently, and will be, acting under color of the laws of the State of Ohio. All the Defendants are engaged in the enforcement and execution of the laws of the State of Ohio, more particularly the Ohio Civil Rights Act (R.C. 4112) *et seq*. Plaintiffs are and will be deprived of constitutionally protected rights by the enforcement and execution of these laws.

FACTUAL ALLEGATIONS

(15) DCS and Linda Hoskinson were parties to a teacher's contract with effective dates of August 23, 1978 to June 8, 1979. (Attached hereto as Exhibit A). The contract contains the following paragraphs:

> "The teacher agrees to follow the Biblical pattern of Matthew 18:15 - 17 and Galatians 6:1 and always give a good report. All differences are to be resolved by utilizing Biblical principles - always presenting a united front.

> The contract between the teacher and Dayton Christian Schools can be voided when any of the above requirements are violated by either party. If after signing the contract, the teacher desires to be excused from said contract, a written request must be made to the Superintendent who will in turn present to the Board for consideration."

(16) Sometime during the last part of 1978 or the early part of 1979, Linda Hoskinson informed DCS that she was pregnant and that her baby was due in June 1979. Officials of DCS rejoiced in the good news and took affirmative action to assist her while she continued to teach.

(17) On February 20, 1979, Linda Hoskinson was informed that she would not be receiving a teaching contract for the next school year because of DCS's belief that preschool children should be at home supervised and cared for by Christian parents.

(18) A difference occurred between Linda Hoskinson and DCS concerning the decision not to offer her a teaching contract for the school year of 1979 - 1980. Mrs. Hoskinson did not follow the Biblical chain of command to resolve the difference, as required by the Bible of all Christians and specifically by her teacher's contract.

(19) On or about March 26, 1979, Mrs. Hoskinson was discharged because of the breach of her teaching contract in not following the Biblical chain of command.

(20) On March 28, 1979, Mrs. Hoskinson filed a charge with the OCRC against DCS because of her discharge.

(21) On April 18, 1980, the OCRC issued a Complaint against DCS concerning the charge filed by Mrs. Hoskinson. The OCRC has proposed a Conciliation Agreement and Consent Order which seeks to regulate the employment practices of DCS, a religious institution, by seeking, among other things, the following affirmative action:

A. Respondent (refers to DCS) agrees to immediately reinstate Complainant, Linda V. Hoskinson, as an employee in good standing with the restoration of all rights, benefits, and privileges of employment as an elementary school teacher.

B. Respondent will reimburse Complainant the amount of backpay which she would have received had she not been terminated. The amount to be paid shall include interest on the base salary, computed at 6% per year. Such backpay will include comparable raise increments as accorded to other school teachers of Complainant's tenure. All monies earned by Complainant in the interim period since her termination shall be deducted from the gross amount owed to Complainant.

C. Respondent will not write or discuss this case in any reference concerning Complainant. Respondent additionally agrees to expunge from Complainant's record any and all documents and entries relating to the facts and circumstances which led to the filing of the charge of discrimination and the related events occurring thereafter.

D. Respondent agrees not to engage in or allow any of its employees to engage in any conduct against the Complainant or any party to or participant in these proceedings the nature of which conduct might be construed as retaliatory.

E. Respondent will not discharge Complainant without just cause. Respondent will submit to the North Southwest Regional Office of the Commission, copies of any warnings or reprimands given to Complainant during the next one (1) year, and will also notify said office if Complainant is discharged for any reason within the period of one (1) year.

F. Respondent agrees to implement and administer the policies and work rules of the school equally without regard for the employees' handicap, race, sex, religion, age, color, national origin or ancestry.

G. Respondent shall post in a conspicuous place or places on its premises, the Commission's mandatory notice which sets forth excerpts of Chapter 4112, Revised Code of Ohio, and other relevant information.

H. Respondent shall not seek information regarding race, color, religion, age, sex, national origin, handicap or ancestry on its form of application, unless a bona fide occupational qualification is certified in advance by the Commission.

I. Respondent shall make clear in its employment contracts that employees may contact the Commission if they believe they are being discriminated against at any time because of handicap, race, sex, religion, age, color, national origin or ancestry.

J. Respondent agrees to establish specific guidelines for employee pregnancy and home child care, to notify all employees in writing of this policy, and to further furnish the Commission's North Southwest Regional Office, within sixty (60) days from the date of ratification of this agreement, proof of compliance with this provision.

K. Not later than thirty (30) days after the effective date of this conciliation agreement and consent order, an authorized officer of the designated Respondent will furnish the North Southwest Regional Office of the Commission a certified check, made to the order of the Complainant, for the full amount of backpay stipulated in Paragraph II(b) supra.

COUNT I.

(22) The Plaintiffs incorporate by reference the allegations of Paragraph (1) through (21) of the Complaint.

(23) The regulation, intermeddling, coercing, intruding, and entanglement of the OCRC into the employment practices of DCS violates the Free Exercise Clause of the First Amendment of the United States Constitution in as much as:

(a) it prohibits the free exercise of the Plaintiff's religious beliefs;

(b) it imposes financial burdens upon purely religious activity;

(c) it imposes burdens of accounting and reporting upon religious ministries;

(d) it burdens and endangers the ability of parents to choose a religious education for their children;

(e) it burdens and endangers the opportunity of religious teachers and administrators to carry out their religious vocation in the Christian formation and education of young people;

(f) it burdens and endangers pastors of churches and religious administrators of religious schools in the exercise of their religious ministry of education;

(g) a finding of employment discrimination by a governmental entity involves a consideration of "just cause". Discharges from employment of a religious entity, however, may in given instances be on religious (including moral) grounds. Yet a governmental agency rendering a determination may not base its determination upon religious principles but solely upon secular standards. Thus the religious entity may be required to reimburse employees that were discharged on religious grounds.

(24) There is no compelling state interest to justify these violations of Plaintiffs' religious liberties.

COUNT II.

(25) The Plaintiffs incorporate by reference the allegations of Paragraphs (1) through (24) of the Complaint.

(26) The aforesaid policy of regulating, intermeddling, coercing, intruding and entanglement violates the Establishment Clause of the First Amendment to the Constitution of the United States in as much as:

(a) it prohibits the Plaintiffs' free establishment of religion;

(b) it prohibits employment discrimination based on religious convictions of Plaintiffs;

(c) where a discharge from employment by a religious institution is based upon religious (including moral) grounds, and the governmental agency rendering a determination takes the religious grounds into account, it engages in excessive government entanglements with religion contrary to the requirements of the Establishment Clause; here the potential for such action is char and present;

(d) a forbidden potential for entanglement between church and state is created by the requirements of employment recordkeeping reporting, and disclosure by religious institutions to a state agency and by compliance with statutes, rules and regulations promulgated by the State of Ohio and the OCRC.

(27) The Plaintiffs have no plain, speedy or adequate remedy at law.

(28) The Plaintiffs will suffer immediate and irreparable injury unless injunctive relief is granted.

WHEREFORE, Plaintiffs pray that the following relief be granted:

(1) that the Court declare the Ohio Civil Rights Act, as applied to DCS, a religious institution, to be unconstitutional;

(2) that the Court grant a temporary restraining order restraining the Defendants from enforcing the Ohio Civil Rights Act against DCS;

(3) that the Court allow the Plaintiffs their costs herein and reasonable attorney's fees; and,

(4) that the Court grant such other relief as it deems equitable and just.

Respectfully submitted,

LOGOTHETIS AND PENCE

/s/ Bruce E. Pence
Attorney for the Plaintiffs
111 West First Street
Suite 1100
Dayton, Ohio 45402
(513) 461-5310

VERIFICATION BY PLAINTIFFS

STATE OF OHIO)
COUNTY OF MONTGOMERY) ss.

I, CLAUDE E. SCHINDLER, JR., being first duly cautioned and sworn, deposes and says that I am a Plaintiff in the above entitled action, that I have read the foregoing Complaint and that the same is true to the best of my knowledge.

/s/ Claude E. Schindler, Jr.

Subscribed and sworn to before me this 1st day of October, 1980.

/s/ Bruce E. Pence
Notary Public

STATE OF OHIO)
COUNTY OF MONTGOMERY) ss.

I, STEPHEN T. HOUSE, being first duly cautioned and sworn, deposes and says that I am a Plaintiff in the above entitled action, that I have read the foregoing Complaint and that the same is true to the best of my knowledge.

/s/ Stephen T. House

Subscribed and sworn to before me this 1st day of October, 1980.

/s/ Bruce E. Pence
Notary Public

STATE OF OHIO)
COUNTY OF MONTGOMERY) ss.

I, CAMILLIA HOUSE, being first duly cautioned and sworn, deposes and says that I am a Plaintiff in the above entitled action, that I have read the foregoing Complaint and that the same is true to the best of my knowledge.

/s/ Camillia House

Subscribed and sworn to before me this 1st day of October, 1980.

/s/ Bruce E. Pence
Notary Public

STATE OF OHIO)
COUNTY OF MONTGOMERY) ss.

I, PAUL PYLE, being first duly cautioned and sworn, deposes and says that I am a Plaintiff in the above entitled action, that I have read the foregoing Complaint and that the same is true to the best of my knowledge.

/s/ Paul Pyle

Subscribed and sworn to before me this 1st day of October, 1980.

/s/ Bruce E. Pence
Notary Public

[Exhibit A omitted, see Exhibit 22]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION, DAYTON, OHIO

IN THE MATTER OF:	)	
	)	
DAYTON CHRISTIAN SCHOOLS, INC., et. al.,	)	
Plaintiffs	)	
	)	
vs.	)	CASE NO. C-3-80-410
	)	
OHIO CIVIL RIGHTS COMMISSION, et. al., Defendants	)	**ANSWER**

The Ohio Civil Rights Commission, by and through its counsel, answers the Factual Allegations in the Complaint in this matter as follows:

1. Admits the allegations contained in Paragraph (15) of the Complaint;

2. Admits the allegation contained in Paragraph (16) that Linda Hoskinson informed Plaintiff that she was pregnant. Defendant denies the remaining allegations in Paragraph (16) of the Complaint;

3. Defendant admits the allegations contained in Paragraph (17) of the Complaint;

4. Defendant admits the allegation contained in Paragraph (18) that a teaching contract was not offered to Mrs. Hoskinson for the school year 1979-1980. Defendant denies the remaining allegations contained in Paragraph (18) of the Complaint;

5. Defendant denies the allegations contained in Paragraph (19) of the Complaint;

6. Defendant admits the allegation contained in Paragraph (20) of the Complaint;

7. Defendant admits the allegation in Paragraph (21) of the Complaint that Defendant issued a Complaint against Dayton Christian Schools concerning the charge filed by Mrs. Hoskinson. Defendant admits that a conciliation proposal was made but denies the remaining allegations contained in Paragraph (21) of the Complaint;

COUNT I

8. Defendant denies the allegations contained in Paragraph (23) of the Complaint;

9. Defendant denies the allegations contained in Paragraph (24) of the Complaint;

COUNT II

10. Defendant denies the allegations contained in Paragraph (26) of the Complaint;

11. Defendant denies the allegations contained in Paragraph (27) of the Complaint;

12. Defendant denies the allegations contained in Paragraph (28) of the Complaint;

WHEREFORE, Defendants, having fully answered the allegations of the Complaint, pray that this matter be dismissed, with prejudice, at Plaintiff's cost.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

KEITH S. MESIROW
Assistant Attorney General
Civil Rights Section
LeVeque Lincoln Tower - 17th Flr.
50 West Broad Street
Columbus, Ohio 43215
(614) 466-7900

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer has been sent by United States mail to the Office of Bruce Pence, Esq., 111 West First Street, Suite 1100, Dayton, Ohio 45402, this 10th day of October, 1980.

KEITH S. MESIROW
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DAYTON CHRISTIAN SCHOOLS, INC. et al.,	:	CASE NO. C-3-80-410
	:	Judge Walter H. Rice
Plaintiffs	:	
-vs-		
OHIO CIVIL RIGHTS COMMISSION, et al.,	:	**FINAL PRETRIAL ORDER**
Defendants	:	

[Filed December 1, 1980]

This action came before the Court at a final pretrial conference held on November 28, 1980 at 8:30 a.m., pursuant to Rule 16, Federal Rules of Civil Procedure.

I. **APPEARANCES:**

For Plaintiffs:

Bruce E. Pence
111 West First Street
Suite 1100
Dayton, Ohio 45402

For Defendants:

Keith S. Mesirow
Donald W. Conley
50 West Broad Street
Suite 1718
Columbus, Ohio 43215

II. **NATURE OF ACTION AND JURISDICTION:**

A. This is an action for injunctive relief.

B. The jurisdiction of the Court is invoked under Title 28 of the United States Code, Sections 1331, 1343, 2201 and 2202; and Title 42 of the United States Code, Section 1983.

C. The jurisdiction of the Court is not disputed.

III. **TRIAL INFORMATION:**

A. The estimated length of trial is one (1) day.

B. Trial to the Court has been set for December 2, 1980 at 9:30 a.m.

IV. **AGREED STATEMENTS AND LISTS**

A. **General Nature of the Claims of the Parties**

(1) PLAINTIFF CLAIMS:

Plaintiffs claim that the Ohio Civil Rights Act is unconstitutional on its face as it applies to the employment practices of a religious institution. Further, Plaintiffs claim that the Defendants are intermeddling with, coercing, intruding upon, and/or becoming entangled in the free exercise and establishment of the Plaintiffs' religious beliefs and activities. Further, Plaintiffs claim that Linda Hoskinson was discharged for religious reasons.

Plaintiffs claim that immediate and irreparble injury, loss and damage will result unless the Defendants are permanently enjoined. More specifically, Plaintiffs will suffer deprivation of the free exercise and establishment of their religious beliefs. Plaintiffs have no plain, speedy or adequate remedy at law.

(2) DEFENDANT CLAIMS:

Defendant claims that it is lawfuly empowered to conduct a public evidentiary hearing on the Complaint of discrimination filed by the Commission and the enjoining of such hearing is contrary to law.

B. **Uncontroverted Facts**

(1) Linda Hoskinson, was an elementary school teacher employed by Dayton Christian Schools, Inc., at the time this action arose in January, 1979. At that time, Mrs. Hoskinson had been employed by Plaintiff for approximately four (4) years.

(2) In January, 1979, Mrs. Hoskinson informed the Principal of her school, Mr. James Rakestraw, that she was pregnant. As a result of her discussion with Mr. Rakestraw, Mrs. Hoskinson received, on or about February 20, 1979, a memorandum from Mr. Rakestraw informing her that her teaching contract would not be renewed for the following school year. (See Attachment A).

(3) Mr. and Mrs. Hoskinson consulted an attorney concerning her employment with Dayton Christian Schools, Inc. Mrs. Hoskinson's attorney wrote a letter to Plaintiff's Superintendent Mr. Claude Schindler. (See Attachment B).

(4) On or about March 13, 1979, a meeting was held with Mrs. Hoskinson, Mr. Schindler, and Mr. Rakestraw. At that meeting, Mrs. Hoskinson was informed that she was to be suspended effective immediately. Mrs. Hoskinson was subsequently discharged.

(5) Mrs. Hoskinson subsequently filed a charge of discrimination with the Ohio Civil Rights Commission alleging that her discharge was due to her pregnancy and therefore discriminatory. The Ohio Civil Rights

Commission found that it was probable that Plaintiff had engaged in discriminatory practices with respect to Complainant. Conciliation efforts failed and Complaint and Notice Hearing No. 3477 was issued by the Commission on April 18, 1980.

C. **Issues of Fact and Law**

(1) CONTESTED ISSUES OF FACT:

The contested issues of fact remaining for decision are:

a. Whether Mrs. Hoskinson was discharged for reasons related to her pregnancy or for religious reasons.

b. Whether the business operations of Dayton Christian Schools, Inc. include the operations of a thrift store.

c. What is the primary purpose and mission of Dayton Christian Schools, Inc.

(2) CONTESTED ISSUES OF LAW:

There are no special issues of law reserved other than those implicit in the pleading and in the foregoing issues of fact.

D. **Witnesses**

(1) Plaintiff will call or have available for testimony at trial those witnesses listed on Appendix A hereof.

(2) Defendant will call or have available for testimony at trial those witnesses listed on Appendix B hereof.

E. **Expert Witnesses**

The parties are limited to the following expert witness, whose name has been disclosed to the other side:

Plaintiff - Eldon Trueblood

Defendant - none

F. **Exhibits**

The parties will offer as exhibits those items listed herein as follows:

(1) Joint Exhibits - Appendix C

(2) Plaintiff's Exhibits - Appendix D

(3) Defendant's Exhibits - Appendix E

G. **Depositions**

No testimony will be offered by deposition or videotape.

H. **Discovery**
Discovery has been completed.

I. **Pending Motions**

The following motions are pending at this time:

Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction.

Defendant's motion to dismiss and dissolve the Temporary Restaining Order filed with the Court on October 16, 1980.

J. **Miscellaneous Orders**

None

V. **MODIFICATION**

This final pretrial order may be modified at the trial of this action, or prior thereto, to prevent manifest injustice. Such modification may be made by application of counsel, or on motion of the Court.

VI. **SETTLEMENT EFFORTS**

Defendant has made an offer of settlement which was rejected by Plaintiff. No counteroffer was made by Plaintiff.

/s/ BRUCE E. PENCE
Counsel for Plaintiff

/s/ KEITH S. MESIROW

/s/ DONALD W. CONLEY
Counsel for Defendant

Approved following Final Pretrial Conference:

JUDGE RICE

WALTER H. RICE
United States District Judge

[Appendices and attachments omitted.]

APPELLANT'S

BRIEF

Supreme Court, U.S.
FILED
DEC 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-488

In The Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., et al.,
Appellees.

ON APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANTS

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QUESTION PRESENTED

Do the Religion Clauses of the First Amendment preclude application of Ohio's laws prohibiting employment discrimination to a private school, providing secular education in a pervasively Christian atmosphere, that terminated a pregnant teacher for violation of the school's biblical chain of command because the teacher consulted an attorney upon learning the school would not renew her contract for the following school year due to its belief that a mother of a young child should be in the home?

PARTIES

The Appellants in this action are the Ohio Civil Rights Commission, Robert D. Brown in his capacity as Executive Director of the Ohio Civil Rights Commission, Rebecca K. Haley Ross in her capacity as Regional Director of the North-Southwest Regional Office of the Ohio Civil Rights Commission, Ronald C. Morgan in his capacity as Commissioner of the Ohio Civil Rights Commission, and Rev. Phale D. Hale, Catherine Ellis, Alyce Lucas, and Jose A. Villanueva successor Commissioners of the Ohio Civil Rights Commission to Wade Franklin, III, Thomas A. Brown, Thaddeus A. Garrett, and Clingan Jackson.

The Appellees are Dayton Christian Schools, Inc., Patterson Park Church, Christian Tabernacle, Claude E. Schindler, Jr., Stephen P. House, and his wife, Camillia House, and Paul Pyle.

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CASE NO. 85-488

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., et al.,
Appellees.

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit issued on June 26, 1985 is set forth in the Appendix (A-1)[1] and is reported at 766 F.2d 932. The decision of the United States District Court for the Southern District of Ohio, Western Division, is also set forth in the Appendix (A-53) and is reported at 578 F.Supp. 1004.

JURISDICTION OF THIS COURT

This is an appeal from a judgment of the United States

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[1]References to "(A-)" are to the appropriate pages in the Appendix to the Jurisdictional Statement. References to "(JA-)" are to the appropriate pages in the Joint Appendix. References to "(a-)" are to the appropriate pages in the Appendix to the Brief for Appellants.

Court of Appeals for the Sixth Circuit entered on June 26, 1985, holding the Ohio Civil Rights Act unconstitutional as applied to Dayton Christian Schools, Inc. The United States District Court for the Southern District of Ohio, Western Division, on remand entered a final judgment in favor of Appellees on August 13, 1985. This action was initiated by Appellees in the district court by filing a complaint pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief.

The Notice of Appeal was filed with the Sixth Circuit Court of Appeals on September 20, 1985, within 90 days of entry of the court of appeals' judgment. This appeal is taken, and jurisdiction is conferred upon this Court, under 28 U.S.C. §1254(2). In its Order of November 12, 1985 the Court postponed the question of jurisdiction to the hearing on the merits. If the Court determines an appeal is not proper in this case, the Court may exercise certiorari jurisdiction pursuant to 28 U.S.C. §§1254(1) and 2103.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Ohio Civil Rights Act, Ohio Revised Code Section 4112.01 *et seq.*, is set forth in full in the appendix (A-132).

STATEMENT OF THE CASE

A. Dayton Christian Schools, Inc.

Dayton Christian Schools, Inc. ("DCS") is a private school, incorporated in Ohio as a non-profit corporation. It is

not a parochial school because it is not identified or affiliated with any one church or denominational group of churches. (Plaintiffs' Exhibit 7). DCS is fully accredited and chartered by the State of Ohio for all grades, pre-kindergarten through post-secondary. *Ibid.* The purpose of DCS, as stated in its constitution, is "to provide a program of education in a positive Christian atmosphere offering regular courses of study, in compliance with the laws and regulations of the State of Ohio and the State Board of Education." (JA-7). The propagation of Christian beliefs is an integral part of DCS' purpose and its religious purposes permeate the schools' goals, curriculum and administration. (A-58). In accordance with the schools' Christian beliefs, each member of the board of directors and the educational staff at DCS must be a born again Christian, must subscribe annually to DCS' Statement of Faith, (JA-62), and must be a member of a church having a doctrine which is in agreement with the Statement of Faith. (JA-5). DCS students and parents must also subscribe to the Statement of Faith and be born again Christians. (Plaintiffs' Exhibit 9).

Teachers at DCS are expected to be scripturally sound in their teaching, to lead exemplary Christian lives and to always give a good report and adhere to a biblical chain of command. (A-59, 75). The chain of command philosophy refers to a scriptural belief in an authority structure founded on Matthew 18:15-17 and Galatians 6:1. (A-59). The chain of command procedure at DCS means employees will go to the school administrator and ultimately the board of directors for dispute resolution (R. 24-54-55, T. 52-53). The board is considered the final arbiter of all disputes arising in the schools and employees are expected to accept its final decisions and not take disputes beyond the schools' authority structure.

B. Linda Hoskinson's Termination.

Linda Hoskinson was employed by DCS as an elementary school teacher in 1974. Mrs. Hoskinson is a born again

Christian. (Plaintiffs' Exhibit 25). Each year during her employment with DCS, Mrs. Hoskinson signed a teacher's contract in which she indicated her acceptance of DCS' educational philosophy and Statement of Faith and agreed to follow the biblical pattern of Matthew 18:15-17 and Galatians 6:1 and always give a good report. (JA-59). The contracts signed by Mrs. Hoskinson did not contain the statement contained in DCS's current teacher's contract that "[p]arties signing this contract waive all rights to take their causes before a court of law." (Plaintiffs' Exhibit 20) (R. 24-128-129, T. 126-127).

In January, 1979 Mrs. Hoskinson told the principal at DCS that she was pregnant and expressed her strong desire to teach at DCS during her pregnancy and the following year. (R. 24-125, T. 123). She was told there probably would be no problem but the principal would check and let her know. *Ibid.* The principal discussed Mrs. Hoskinson's pregnancy with the superintendent, Mr. Claude Schindler. (R. 24-69, T. 67). On February 20, 1979 Mrs. Hoskinson received a memorandum informing her that her teaching contract would not be renewed. The memorandum stated:

> [A]s you will be a new parent your teaching next year would be in contrast to the School's philosophy. As a school, we see the importance of the mother in the home during the early years of child growth. (JA-70).

Upon learning her contract would not be renewed, Mrs. Hoskinson consulted an attorney concerning the legality of the schools' action. That attorney sent a letter to the superintendent on March 6, 1979, notifying him that the schools' practices were potentially discriminatory and stating "[t]o preclude my client from further employment on the basis of pregnancy and childbearing constitutes violations of both state and federal discrimination laws." (JA-71). On or about March 14, 1979, Mrs. Hoskinson met with the principal and superintendent and was informed that she was to be suspended immediately because she had gone to an attorney. (A-63). The next day Mrs. Hoskinson met with the DCS board

of directors and discussed her family situation and employment. (R. 24-129-131, T. 127-129). The board met again on March 26, 1979 and at that meeting voted to terminate Mrs. Hoskinson's services. (JA-73). On March 27, 1979 Superintendent Schindler notified Mrs. Hoskinson of her termination. He gave her letters rescinding the February 20th memorandum and indicating she was being terminated due to serious philosophical differences as evidenced by her violation of paragraph 13 of her employment contract in not following the biblical chain of command. (JA-74). Superintendent Schindler explained the earlier memorandum was being rescinded because the administrators had concluded the policy on not employing mothers with pre-school age children had not been carefully studied or documented, or adequately explained to the faculty, and further scriptural guidance was needed. (A-61, 99).

On March 28, 1979 Mrs. Hoskinson filed with the Ohio Civil Rights Commission a charge of discrimination based on sex discrimination and retaliation. (JA-76).

C. The Ohio Civil Rights Act.

The Ohio Civil Rights Act, Ohio Rev. Code Chapter 4112, is the State's counterpart of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. This dual scheme for eliminating discriminatory employment practices is authorized by 42 U.S.C. §2000e-5(c), which provides that if a state has a law prohibiting an alleged unlawful employment practice and an agency authorized to grant relief, a complainant must commence state resolution of the charge before resort to the federal system, and 42 U.S.C. §2000e-8(b), which authorizes the Equal Employment Opportunity Commission to enter into cooperative agreements with state agencies charged with the administration of state fair employment laws.

The Ohio Act, like its federal counterpart, prohibits employers from discriminating against persons with respect

to hire, tenure, terms, conditions, or privileges of employment because of the person's race, color, religion, sex or national origin. The Ohio Act also prohibits employment discrimination on the basis of handicap, age or ancestry. Ohio Rev. Code §4112.02(A); 42 U.S.C. §2000e-2(a)(1). The acts also make it unlawful for any person to discriminate against another because that person has opposed an unlawful employment practice. Ohio Rev. Code §4112.02(I); 42 U.S.C. §2000e-3(a). The Ohio Act does not contain any explicit exemption for religious employers. Title VII exempts religious employers from the prohibition against discrimination based on religion but religious organizations remain subject to the provisions of Title VII with regard to race, color, sex, or national origin. 42 U.S.C. §§2000e-1, 2000e-2(e)(2).

A comprehensive statutory scheme directs the Ohio Civil Rights Commission in the enforcement of the Act. Ohio Rev. Code §4112.05. Upon receipt of a charge, or upon its own initiative, the commission is directed to conduct a preliminary investigation. If it determines it is probable that unlawful discriminatory practices have been engaged in, the commission must first endeavor to eliminate such practices by informal methods of conference, conciliation or persuasion. If the commission fails in its efforts to resolve the charge through conciliation, the commission issues a complaint and notice of hearing. If the commission determines the employer has engaged in any unlawful discriminatory practice, it issues a cease and desist order and may order other affirmative action including reinstatement of the employee, back pay or compliance reporting. The orders of the commission are subject to judicial review and the reviewing court is empowered to grant temporary relief and restraining orders and may modify or set aside the order of the commission. Ohio Rev. Code §4112.06.

D. The Proceedings Below.

Upon receipt of Mrs. Hoskinson's charge, the commission conducted a preliminary investigation and determined it

was probable that DCS had engaged in unlawful sex discrimination and retaliation. (JA-87). The commission attempted to resolve the charge through conciliation, (JA-85), but these efforts were unsuccessful and a complaint was issued. The complaint alleged DCS had discriminated against Mrs. Hoskinson for reasons not applied equally to all persons without regard to their sex and had retaliated against her for opposing these discriminatory practices. (JA-100). During the investigation and in its answer to the complaint, DCS asserted it was a religious institution and, therefore, was not subject to the commission's jurisdiction. (JA-87, 103).

Prior to the scheduled date of the commission's hearing, the Appellees filed a complaint in the United States District Court for the Southern District of Ohio, Western Division, to enjoin the commission from conducting a hearing on the charges filed by Mrs. Hoskinson. The district court found the statutory provisions of Ohio Revised Code §4112.01 *et seq.* were intended by the legislature to apply to employers such as DCS, even though a pervasively religious environment was involved. (A-87). The issue before the district court was whether the commission could entertain jurisdiction to investigate and conduct a hearing on a charge of unlawful sex discrimination and retaliatory firing without impermissibly infringing on Appellees' asserted First Amendment rights to freedom of religion. (A-88). The court concluded that allowing the commission to proceed with the hearing would not pose a substantial risk of impingement by the State on Appellees' exercise of their religious belief or an immediate threat of excessive church/state entanglement. The injunction, therefore, was denied.

The Sixth Circuit reversed and held the Act unconstitutional as applied to DCS. It concluded the Act impaired the free exercise rights of the school and parents of students in the school by potentially forcing DCS to reinstate a teacher whose status as a working mother would have made her a poor religious role model (in the schools' and parents' view), and who had violated a tenet of the schools' beliefs by contesting its sexually discriminatory practices. Based on

these infringements and its perception of the statutory scheme as "highly coercive," (A-29), the circuit court found the burdens on Appellees' religious beliefs to be great. (A-24). The court, although recognizing the State's compelling interest in eliminating discrimination, (A-36), nonetheless concluded "accommodation of the religious beliefs in this case would not significantly interfere with the state's fulfillment of its goal of eradicating discrimination" and suggested there may be less drastic alternatives for accomplishing that goal, such as the denial of tax exemptions or state aid. (A-37,38).

The Sixth Circuit also found an establishment clause violation. Although it concurred with the lower court's conclusion that the statute has a secular purpose and does not have the effect of either advancing or inhibiting religion, the Sixth Circuit concluded the application of the statute in the instant matter would foster excessive church/state entanglement. The court concluded that inquiries into the employment practices of DCS would necessarily result in excessive church/state entanglement due to the pervasively religious nature of DCS, the important role of teachers in fostering religious beliefs, and the fact that religious considerations are an integral part of DCS's hiring practices. (A-49). The court also feared impermissible entanglement would ensue because it believed the commission would necessarily become involved in issues of good faith and motivation. *Ibid.*

SUMMARY OF ARGUMENT

The Ohio Civil Rights Act prohibits employers from discriminating against persons with respect to hire, tenure, terms, conditions or privileges of employment because of the person's sex. The Act also makes it unlawful for an employer to discriminate against a person because the person has opposed an unlawful discriminatory employment practice. The Sixth Circuit held these provisions of the Act unconstitutional as applied to DCS, a private Christian school. Because the court focused its holding directly on the Act itself, this

Court's appellate jurisdiction is properly invoked under 28 U.S.C. §1254(2). *Dutton* v. *Evans*, 400 U.S. 74 (1970).

It is the State's position that this is a free exercise case and not an establishment clause case because the Act is a neutral state regulation enacted pursuant to the State's power to legislate for the common good. The Act does not threaten to aid any or all religions or to prefer one religion over another. It is most closely akin to the statutes considered by this Court in *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), *United States* v. *Lee*, 455 U.S. 252 (1982) and *Bob Jones University* v. *United States*, 461 U.S. 574 (1983). In each of these cases the Court sought to determine whether the statute's burden on the exercise of religious beliefs was essential to accomplish a compelling governmental interest. The test articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and traditionally applied to determine whether a statute offends the Establishment Clause, questions the inhibiting effect of the statute on religion for the limited purpose of determining whether the inhibiting effect on one religion aids other religions. If, however, the *Lemon* test is applied in this instance, the Court should expand the test to determine whether the possible entanglement resulting from the application of the Act to DCS is justified by a compelling state interest. *Larson* v. *Valente*, 456 U.S. 228 (1982).

Application of the Act to DCS does not violate the Free Exercise Clause. The State recognizes the paramount position of religious liberty in the Constitution but contends the State's interests here are likewise of the highest order. In recognizing these competing concerns, the State acknowledges that this case presents issues of grave importance which are not easily resolved. This Court has determined that, conduct, even though based on religious belief, may be regulated and even prohibited if the burden is "essential to accomplish an overriding governmental interest." *Bob Jones University* v. *United States*, 461 U.S. 574, 603 (1983) (quoting *United States* v. *Lee*, 455 U.S. at 257-258). The State can burden religious beliefs in the instant case because of the

nature of the State's interests as well as the nature of the institution. DCS is not a church nor an institution providing strictly religious education. While religion pervades the atmosphere at DCS, it is also a school chartered by the State of Ohio as providing an acceptable alternative to public education. Having crossed into the secular realm of education, the school can no longer contend the Free Exercise Clause grants a total exemption from state regulation, for education is "perhaps the most important function of state and local governments." *Brown* v. *Board of Education*, 347 U.S. 483 (1954). The State's interest in education coupled with the State's absolutely fundamental interest in eradicating discrimination tips the delicate constitutional balance toward the State. Thus, the State's interest in this case is more compelling than it has been in the cases in which this Court has struck down statutes burdening religious conduct. The factor present in this case but absent in *Sherbert* v. *Verner* 374 U.S. 398 (1963), *Thomas* v. *Review Board*, 450 U.S. 707 (1981) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) is the irreconcilable conflict between the practice of religious beliefs and the rights or welfare of third parties. The State has determined that in this instance the right to equal employment opportunities and the means to protect that right should prevail. Its position is supported by this Court's recognition that sexually discriminatory conduct is as offensive as racially discriminatory conduct. *Roberts* v. *United States Jaycees*, 468 U.S. ____, 104 S.Ct. 3244 (1984). The State's position is likewise supported by this Court's holdings that discriminatory practices are undeserving of constitutional protection, particularly when they occur in educational settings. *Bob Jones University* v. *United States; Runyon* v. McCrary, 427 U.S. 160 (1976).

Application of the Act to DCS does not violate the Establishment Clause which prohibits only that entanglement resulting in the "excessive" involvement of the state in "religious activity." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971). In applying the Act to DCS, the Ohio Civil Rights Commission would not be required to delve into DCS'

religious tenets or the sincerity of its beliefs because under the statute, as enacted by the Ohio legislature, a school's religious motives or beliefs will not excuse sexually discriminatory or retaliatory employer conduct. Application of the Act will not threaten DCS' autonomy because the Act restricts DCS' decision-making ability only when its decisions are unequally applied. The administrators would not be forced to share their general decision-making authority with the commission or any third-party. The likelihood, magnitude, frequency or duration of any entanglement is much more narrowly circumscribed under the anti-discrimination laws than under the general labor relations statute analyzed in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

In the other instances where religion is the basis for an exemption from the civil rights law, the exemption does not have the effect of preferring one religion over another. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 and §2000e-2(e)(2) exempts religious organizations from the prohibition against discrimination based on religion. The constitutional exemption recognized in *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) bars suit under Title VII against all churches based on sex discrimination. The exemption created by the Sixth Circuit, in contrast, exempts only those religious institutions espousing discriminatory beliefs. The exemption, therefore, runs afoul of the Establishment Clause because it impermissibly discriminates among religions. *Larson* v. *Valente*, 456 U.S. 228 (1982).

ARGUMENT

I. THIS COURT'S JURISDICTION IS PROPERLY INVOKED UNDER 28 U.S.C. §1254(2) BECAUSE THE CIRCUIT COURT HELD THE OHIO CIVIL RIGHTS ACT UNCONSTITUTIONAL AS APPLIED.

This Court is empowered to review a decision of a federal court of appeals "[b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States." 28 U.S.C. §1254(2). While the Court has emphasized that statutes authorizing appeals are to be strictly construed, *Perry Educ. Assoc.* v. *Perry Local Educators' Assn* 460 U.S. 37 (1983), it has held that §1254(2) requires the exercise of appellate jurisdiction where a state statute is held unconstitutional as applied. *Dutton* v. *Evans*, 400 U.S. 74, 77 (1970) (note 6). The conclusion in *Dutton* was recently reaffirmed in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615 (1984) and *Burger King Corp.* v. *Rudzewicz*, ____ *U.S.* ____, *105 S.Ct. 2174 (1985)*. *In Silkwood*, the Court summarized its prior holdings in the following general rule:

> In keeping with the policy that statutes authorizing appeals are to be strictly construed,... we have consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute. The former come within the scope of §1254(2)'s jurisdictional grant.... The latter do not.

104 S.Ct. at 620-621 (Citations omitted.). In *Burger King* the Court declined to exercise appellate jurisdiction only "[b]ecause it is unclear whether the Eleventh Circuit actually held that [the Florida statute] *itself* is unconstitutional as applied to the circumstances in this case." 105 S.Ct. at 2181. *See also Franchise Tax Bd. of California* v. *U.S. Postal Service*, 467 U.S. 512 , 104 S.Ct. 2549, 2551 (1984) (note 7).

Unlike the decisions in *Silkwood* and *Burger King*, the Sixth Circuit's decision in this case is not the least bit ambiguous. Its decision to hold the Act itself unconstitutional as applied to DCS was made abundantly clear. The court expressly noted this Court's caution that "[a] statute 'ought not be construed to violate the Constitution if any other

possible construction remains available'." (A-18). The court then independently examined the Act and concluded:

> Accordingly, the statute asserts a clear expression of intent to apply the prohibitions at issue in this case to all employers, including religious institutions. Even under the analysis of *Catholic Bishop*, we cannot avoid the constitutional questions posed here. Therefore, we consider whether the Act may be applied to DCS consistent with the commands of the First Amendment.

(A-20-21) (Footnote omitted.). In response to DCS' free exercise claims, the court held: "This heavy burden and the coercion that naturally results compels the conclusion that the statute cannot constitutionally be applied to DCS." (A-39). In response to Appellees' establishment clause claims, the court concluded "application of the Ohio Civil Rights Act in this context impermissibly entangles the state in issues of faith in violation of the Establishment Clause of the First Amendment." (A-49). *See also* (A-4) (note 5) ("Appellants also asserted the Act was unconstitutionally vague and overbroad. Since we find the Act cannot be constitutionally applied to appellants, we do not address these arguments which were rejected by the district court.")

This case, therefore, is readily distinguished from cases in which courts have invalidated actions taken pursuant to statute but left the statute itself untouched. The court below focused its decision directly on the Ohio statute, and declared the statute itself unconstitutional as applied. The present appeal, accordingly, falls squarely within this Court's §1254(2) appellate jurisdiction.

II. THE RELEVANT ANALYSIS IN THIS CASE IS PROPERLY LIMITED TO THAT UTILIZED TO RESOLVE CLAIMS ARISING UNDER THE FREE EXERCISE CLAUSE.

Both the district court and the court of appeals conducted the preliminary investigation required by *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) to determine whether the Ohio legislature intended the Ohio Civil Rights Act to apply to schools such as DCS. Both courts agreed the statute asserts a clear expression of affirmative legislative intent to prohibit discriminatory and retaliatory conduct by all employers, including religious schools. (A-20, 87). The parties have not disputed this finding. This case, therefore, unavoidably presents the question of whether the application to religious schools of religiously neutral state legislation[2] enacted to eradicate discrimination in employment violates the religious freedoms guaranteed under the First Amendment.

The Religion Clauses of the First Amendment seek to accomplish the common goal of guaranteeing religious liberty. Although the clauses overlap, "they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engle* v. *Vitale*, 370 U.S. 421, 430 (1962). The

[2]The issues before the commission were limited to whether Mrs. Hoskinson's termination violated the Act's prohibitions against sex discrimination and retaliatory conduct. (JA-87). This case does not present the question of whether a religious employer has a constitutional right to discriminate on the basis of religion. Mrs. Hoskinson was not fired because she was a nonbeliever. Mrs. Hoskinson was fired because she sought to determine whether it was lawful for DCS to refuse to renew her contract because she was pregnant. Nor does this case call into question this Court's holdings regarding avoidance of secular involvement in matters of purely ecclesiastical concern. *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976). Mrs. Hoskinson was a lay teacher in a religious school, not a minister of a church.

Establishment Clause seeks to ensure governmental neutrality in matters pertaining to religion by prohibiting governmental acts that "aid one religion, aid all religions, or prefer one religion over another." *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947). The Establishment Clause serves as the sentinel against the evils of governmental "sponsorship, financial support and active involvement of the sovereign in religious activity." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970). The cases in which this Court has considered establishment clause claims fall into three categories. The first category is comprised of cases involving state statutes providing governmental aid to activities conducted by religious organizations. *See, e.g., Roemer* v. *Maryland Board of Public Works*, 426 U.S. 736 (1976); *Lemon* v. *Kurtzman*. The second category consists of cases involving the intrusion of religious matters into governmental activities. *See, e.g., Wallace* v. *Jaffree*, 459 U.S. 1314, 105 S.Ct. 2479 (1985); *Estate of Thornton* v. *Caldor*, ____ U.S. ____, 105 S.Ct. 2914 (1984); *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963). The third category is typified by cases involving state statutes that explicitly discriminate among religions. *See, e.g. Larson* v. *Valente*, 456 U.S. 228 (1982). The Court has not utilized the Establishment Clause to invalidate the application of a religiously neutral state statute enacted pursuant to the exercise of the state's police powers. The Free Exercise Clause, on the other hand, imposes constitutional limits on neutral governmental regulations that may inhibit religious beliefs. The Free Exercise Clause seeks to protect against governmental coercion by requiring accommodation between the exercise of state authority and the freedom to exercise religious beliefs. *United States* v. *Lee*, 455 U.S. 252 (1982). Since the Ohio Civil Rights Act's prohibitions against sexually discriminatory and retaliatory employer conduct are religiously neutral in purpose and operation, it is the State's position that the relevant analysis in this case is properly limited to that utilized to resolve claims arising under the Free Exercise Clause. However, since the court of appeals held the Act unconstitutional as applied on both free exercise and establishment clause grounds, both provisions are discussed in the following arguments.

III. APPLICATION OF THE STATUTE'S PROHIBITION AGAINST SEX DISCRIMINATION AND RETALIATION TO DCS DOES NOT VIOLATE THE FREE EXERCISE CLAUSE BECAUSE THE STATE'S OVERRIDING INTEREST IN PROVIDING EQUAL EMPLOYMENT OPPORTUNITIES JUSTIFIES THE BURDEN ON THE SCHOOLS' EXERCISE OF RELIGIOUS BELIEFS.

This Court has held that while the Free Exercise Clause establishes "an absolute prohibition against governmental regulation of religious belief," the Clause imposes only a qualified restriction on governmental regulation of conduct grounded on religious beliefs. *Bob Jones University* v. *United States*, 461 U.S. 574, 603 (1983). While the Clause provides "substantial protection for lawful conduct grounded on religious belief***'[n]ot all burdens on religion are unconstitutional.... The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest'." *Id.* (quoting *United States* v. *Lee*, 455 U.S. at 257-258 (1982)). Where accommodation of a religious belief would unduly interfere with the fulfillment of an overriding governmental interest, the Clause will allow even regulations prohibiting religiously based conduct, *see, e.g., Prince* v. *Massachusetts*, 321 U.S. 158 (1944), or requiring conduct contrary to religious belief, *see, e.g., United States* v. *Lee; Gillette* v. *United States*, 401 U.S. 437 (1971).

A. Application Of The State's Prohibition Of Sex Discrimination And Retaliation In Employment To DCS Is Not An Impermissible Burden On Appellees' Religious Liberty.

Mrs. Hoskinson's charge of discrimination questioned first DCS's decision not to renew her teaching contract because she was pregnant and second the decision to terminate her contract because she had consulted an attorney regarding her right to continue teaching at DCS. (JA-76). DCS

resisted the commission's exercise of jurisdiction over these charges on the grounds that the actions taken were related to DCS' belief that the Bible ordains differing roles for men and women and its belief in a biblical chain of command philosophy. (JA-87, A-98). The State does not contend that application of the Ohio Civil Rights Act in this instance would not implicate these beliefs. Nor does it contend that the beliefs are not significant or sincerely held or that the beliefs themselves are not entitled to constitutional protection. The State does contend, however, that the burden imposed upon the practice of these beliefs, as a result of the application of the Act, is permissible because of the nature of the institution involved and the overwhelming importance of the State's objective in seeking to eradicate discriminatory conduct based on immutable characteristics such as sex or race.

The State does not question the freedom of religious institutions to act in matters of purely ecclesiastical concern. With respect to such matters as church governance, religious ritual, worship and spiritual leadership, the decisions of religious institutions are properly inviolate. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The State, for example, is certainly not contending churches are not free to hire only male ministers or that celibacy or obedience requirements cannot be enforced against employees of religious institutions who carry out ecclesiastical duties. Nor is the State contending a religious institution's employment decisions are subject to state regulation with respect to persons selected to offer exclusively religious instruction. DCS, however, is not a church, a seminary or a Sunday school. DCS' activities, although pervasively religious, fall on a different tier than religious worship or purely religious instruction. DCS is a full-scale elementary and secondary school engaged in the endeavor of providing, as a state-chartered alternative to the public schools, secular education as well as religious instruction. DCS, therefore, falls at the intersection between purely religious and purely secular activity. In this

hybrid setting, given the State's most basic interest in ending discrimination based on immutable characteristics, the Act may be permissibly applied to DCS.[3]

The State's position that it cannot accommodate discrimination on the basis of sex in this setting is supported by this Court's holding in *United States* v. *Lee*, 455 U.S. 252 (1982). The Court states in *Lee*: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." 455 U.S. at 261. Accordingly, the Court found that Congress had sufficiently accommodated the Amish employer's religious objection to participation in the social security system by exempting only self-employed Amish individuals. Likewise, the State recognizes the constitutional right of religious employers to discriminate in the area of religious worship and instruction. Since DCS crosses into the secular realm, however, the State properly may act on discrimination occurring in its schools.

The State, of course, does not contend education is mere commerce. The principle recognized in *Lee* is, however, no less applicable. As a private corporation created for the

[3]The decision below stands alone in requiring a constitutional exemption for religious institutions from governmental regulations prohibiting discrimination in employment on the basis of race, sex or national origin. Every other court that has considered the application of such laws to religious employers, other than churches, have held a constitutional exemption is not automatically required. *See, e.g., EEOC* v. *Pacific Press Publishing Association*, 676 F.2d 1272, 1281 (9th Cir. 1982); *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *Russell* v. *Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982); *Dolter* v. *Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa, 1980). *Compare, Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (Free Exercise Clause bars suit under Title VII of Civil Rights Act of 1964 against church on behalf of woman denied a pastoral position).

purpose of providing secular as well as religious education, DCS has entered a world that goes beyond purely personal conduct or purely religious concerns. DCS has entered a field of particular state concern and traditionally subject to extensive regulation. In *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954) the Court states:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship."

The Court has consistently recognized the State's right to require and regulate secular education. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). DCS voluntarily offers secular education, knowing state regulation is inevitable for DCS' own constitution affirmatively states its intent to act "in compliance with the laws and regulations of the State of Ohio and the State Board of Education."[4] (JA-7). Although DCS sees itself as a pervasively religious entity, it is nonetheless a school and an employer and is, therefore, rightfully subject to the State's religiously netural laws enacted to protect the public safety, peace and

[4]One such regulation is Rule 3301-35-03(A) which states: "Certificated and classified staff shall be recruited, employed, assigned, evaluated, and provided inservice, education without discrimination on the basis of age, color, national origin, race or sex." Ohio Admin. Code §3301-35-03(A). (a-17). This regulation is applicable to DCS as a nonpublic school chartered by the state board of education. Ohio Admin. Code §3301-35-04. (a-25).

order.[5]. *See Wisconsin* v. *Yoder*, 406 U.S. 205, 239, (note 1) (J. White, concurring).

The circuit court's contrary position does not find the support it seeks in *Wisconsin* v. *Yoder*. *Yoder*, in fact, recognizes that a burden on religious belief may be permissible where necessary to further a state interest of the "highest order," if that interest cannot otherwise be served. 406 U.S. at 215. *Yoder* is readily distinguished from this case. The importance of the State's interest is greater here. The burden imposed is less. This Court found in *Yoder* that enforcement of the state's mandatory school attendance law for an additional two years would result not only in forcing the Amish to act contrary to their beliefs but could threaten the continued existence of that particular religious sect. Amish communities were found to be "characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." 406 U.S. at 210. The concept of life apart from the world and its values was found to be central to Amish faith. *Id.* Amish religious belief was found to be so inextricably intertwined with their daily home life that exposure of Amish children after a certain age to public education, in remote locations and circumstances alien to their home life, gravely endangered the children's religious development and integration into the Amish faith community. The extent of the Ohio Civil Rights Act's infringement on DCS' ability to continue to believe and practice their espoused religious tenets is not of comparable magnitude. The Act restricts DCS' activities only to the extent to which it, as an

[5]Carried to its logical conclusion, the lower court's reasoning would afford DCS a constitutional exemption not only from the State's equal employment laws but from all laws which happen to conflict with the tenets of its religious beliefs. Under the court's reasoning, DCS' interpretation of the biblical chain of command would preclude, for example, its teachers and administrators from complying with the provisions of Ohio Revised Code §2151.421 which require all school teachers and school administrators to immediately report cases of suspected child abuse or child neglect to the county children services board or a peace officer. (a-1).

employer, seeks to impose its beliefs on its employees, and even then only to the extent its beliefs are unequally applied on the basis of sex, race, or other classifications protected under the Act. This case does not question a religious school's right to hire members of its own faith as teachers. Nor does the application of the Act prevent religious schools from firing teachers for violations of nondiscriminatory religious precepts. The Act, for example, would not prevent a school, like DCS, from firing teachers who smoke, drink alcohol or engage in sexual conduct in violation of moral tenets requiring abstinence, temperance or celibacy, so long as these actions were equally applied regardless of sex or race. The Act would not prevent a school from firing teachers for disobeying its biblical chain of command, except where the teacher was acting to oppose unlawful discrimination.

The other factors relied upon by the lower court to support its conclusion that the statute is burdensome on the parties to this action find no more support in this Court's precedents. The circuit court found "[t]he burden on the parents' exercise of religion is particularly onerous in light of the heightened parental interest in their children's education." (A-33). In *Runyon* v. *McCrary*, 427 U.S. 160, 178 (1976), the Court expressly rejected the notion that the parents' constitutionally protected right to direct the upbringing and education of their children conferred "a constitutional right to provide their children with private school education unfettered by reasonable governmental regulation." The Court likewise rejected the notion that the parents' freedom of association required the government to tolerate discrimination in private educational settings.

> From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is

> also protected by the same principle. ***"[T]he Constitution . . . places no value on discrimination"*** and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.

Id. 427 U.S. at 176 (quoting *Norwood* v. *Harrison,* 413 U.S. 455 (1973)). While *Runyon* did not involve a private sectarian school that practiced discrimination on religious grounds, 427 U.S. 168, (note 6), this distinction should not compel a different result. The protection of religious belief should not be more liberally construed than the other first amendment freedoms in this limited context where to do so would give affirmative constitutional protection to discrimination, the eradication of which is a fundamental, overriding governmental interest. *Bob Jones University* v. *United States,* 461 U.S. at 595. The State does recognize the constitutional right to elect private religious education as an alternative to public education, *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), however, recognition of the right to private education does not compel abdication of the State's right to proscribe discrimination in such educational settings.

B. The Restrictions Sought To Be Imposed on DCS Are Justified By the State's Compelling Interest In The Eradication Of Sex Discrimination In Employment.

The First Amendment's protection of religious liberty "plainly rank[s] high 'in the scale of our national values'." *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. at 501. The most fundamental value underlying the freedom of religion and all other first amendment freedoms, however, is that of equality. American history is replete with the struggle of groups to attain the ultimate goal of equality. Freedom of religion most certainly is a right basic in our country's fiber but equality is the cornerstone of our Constitution. The

instant case, therefore, presents a direct collision between two paramount interests. The State of Ohio would not wade into the cherished area of religious freedom were it not essential to accomplish the State's absolutely fundamental interest in providing equality to women. Within the confines of this case, the State's interest should override that of the school for "the Constitution places no value on discrimination." *Norwood* v. *Harrison,* 413 U.S. at 469. The school should not be permitted in this setting to drape its discriminatory practices in the protective mantle of the Constitution.

This Court is familiar with the severe and pervasive discrimination suffered by females throughout history. The Court has acted to strike down "archaic and overbroad generalizations" about women which result in second class citizenry. *Schlesinger* v. *Ballard,* 419 U.S. 498, 508 (1975). Further, the Court has recognized that women's struggle for equality has been an arduous endeavor made difficult by paternalistic notions of women as the "weaker" sex.

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage.

Frontiero v. *Richardson, 411 U.S. 677, 684 (1973). As a result of this paternalistic notion rooted in our national consciousness:*

> *our statute books gradually became ladden with gross, sterotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Id.* 411 U.S. at 685.

In *Bob Jones University* v. *United States*, the Court recognized the governmental interest in denying public support to racial discrimination was sufficiently compelling to deny tax-exempt status to religious schools practicing race discrimination on religious grounds. The Court found: "Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy." 461 U.S. at 595. The fact that the discrimination involved in this case is sex discrimination does not make the State's interest any less compelling.[6] This Court recently proclaimed this fact in *Roberts* v. *United States Jaycees*, 468 U.S. _____ ,104 S. Ct. 3244, 3254 (1984), wherein the Court noted "the stigmatizing injury, and the denial of equal opportunities that accompanies it," is as serious when the discrimination is based on sex as when it is based on race. It is not difficult to imagine a case of race discrimination arising under a fact pattern similar to that of the present case. A school, such as Bob Jones University, believing the Bible requires separation of the races, could fire a caucasian teacher who marries a black person. The termination would occur because the comingling of the races violates the school's biblical principles. Certainly this action would contravene the State's interest in eradicating race discrimination. The action taken by DCS is no less egregious because it is premised on the immutable characteristic of sex rather than race.

Furthermore, by enacting Title VII, Congress targeted the elimination of all forms of discrimination as the "highest priority." *Alexander* v. *Gardner-Denver Company*, 415 U.S. 36, 47 (1974). In adding sex to the protection of Title VII,

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[6]Finding the State's interest in eradicating sex discrimination compelling in this instance does not require elevating sex to the status of a suspect class. The issues in this case deal only with the balancing test employed when a state statute is challenged on free exercise grounds. The issues do not involve the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *See Craig* v. *Boren*, 429 U.S. 190 (1976).

Congress evidenced the national commitment to ending sex discrimination. "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." 1972 U.S. Code Cong. & Ad. News vol. 2, p. 2141.

There is no basis for the distinction that Ohio's interest in ending discrimination is any less compelling than that of the federal government. By enacting the laws against discrimination, the State of Ohio has exercised its sovereign right to legislate in the field of equal employment opportunity. The fact that Title VII is the federal counterpart to the State's Act does not require Ohio to limit the coverage of its Act to that of the federal government. 42 U.S.C. §2000e-7. The State, within the confines of the Constitution, may broaden its coverage beyond that of Title VII. The Ohio legislature has affirmatively pronounced its profound interest in ending discrimination and the State's right to enact this broader coverage must be granted due consideration.

In recognizing the State's compelling interest in eradicating sex discrimination, the State's interest in protecting employees who file charges must be accorded equal weight even though it directly conflicts with DCS' chain of command tenet. The endeavor to end discrimination certainly would be fruitless if persons seeking redress under anti-discrimination laws were not protected from retaliation for taking such action. The enforcement of state and federal anti-discrimination laws is necessarily dependent on individual complaints. *Id.*, 415 U.S. at 45. If such complaints cannot be made without fear of reprisal, a chilling effect would result, freezing the enforcement of the anti-discrimination laws. The State's ability to investigate retaliatory conduct is, therefore, absolutely essential to attain the State's interest in eradicating sex discrimination.

In addition to the State's interest in eradicating discrimination, the individual rights of Linda Hoskinson are of particular importance in balancing the interests of the parties to this

action. The Court has recognized that "the right[s] of the individual . . . to acquire useful knowledge, to marry, establish a home and bring up children," are fundamental liberty interests protected from state interference by the Due Process Clause of the Fourteenth Amendment. *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Furthermore, this Court has recognized an individual's right to personal determinations regarding procreation. *Roe* v. *Wade*, 410 U.S. 113 (1973), *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). In *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632 (1974), the Court held a policy requiring a teacher to take mandatory leave at a predetermined date prior to the expected birth of her child violated due process because overly restrictive maternity leave operated to penalize the pregnant teacher for deciding to bear a child and in so doing, constituted a heavy burden on the exercise of protected freedoms. The State, of course, does not contend the Fourteenth Amendment limits the actions of private schools. The State does contend, however, the same reasons that support Fourteenth Amendment protection of these rights also support the State's interest in prohibiting sex discrimination in employment. The command of the school that Mrs. Hoskinson stay at home with her children was an attempt to deprive Mrs. Hoskinson of her personal freedom to raise her children as she wanted.

Finally, affirmance of the Sixth Circuit's decision would require this Court to relegate the State's interest in the eradication of sex discrimination and retaliatory behavior to a lower plane than other interests the Court has found compelling. This would mean eradication of sex discrimination is less compelling than the government's interest in eradicating race discrimination, in the Social Security System, in Sunday closing laws, in child labor laws, and in eradicating polygamy. *Bob Jones University* v. *United States; United States* v. *Lee; Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1878). In each of these cases, the Court found the state's interests directly collided with a sincerely held religious belief but the state's interests prevailed.

C. Accommodation of DCS' Belief Precludes The Attainment Of The State's Compelling Interest If Ending Discrimination In Employment.

The Ohio Civil Rights Act seeks nothing less than to guarantee equal employment opportunities for women who want to work. It seeks to accomplish this goal by prohibiting employers from discriminating on the basis of sex and from retaliating against employees who oppose unlawful practices. With respect to these provisions the Ohio Act is no broader than Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e-2(a) (1); §2000e-3(a). While Title VII provides explicit exemptions for religious employers for religious discrimination, 42 U.S.C. §§2000e-1, 2000e-2(e) (2), "[church-affiliated] organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin." *EEOC* v. *Pacific Press Publishing Assoc.*, 676 F.2d 1272, 1277 (9th Cir. 1982) (citing Section by Section Analysis of H.R. 1746, the Equal Opportunity Act of 1972, 118 Cong. Rec. 7167). *See also Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985). Thus the Ohio legislature is not alone in its determination that prohibiting sexually discriminatory or retaliatory employer conduct, even by religious organizations, is essential to accomplishing the goal of assuring equal employment opportunities. The court of appeals attempted to distinguish the Ohio Act from Title VII on the ground that Ohio does not provide an explicit exemption for religious discrimination comparable to that contained in Title VII. (A-16, note 18). The absence of an explicit statutory exemption for religious discrimination is immaterial, however, since the Constitution itself restrains the State from taking action to limit religious discrimination, (A-96), and from regulating employment decisions in the areas of worship or purely religious instruction. *Id.* If state legislatures were required to include accommodation requirements in every statute that might conceivably conflict with the beliefs of various religious sects, there would be no need for the Constitution or the protective avenue of the judiciary.

By ordering the State to tolerate DCS' discriminatory and retaliatory actions against Mrs. Hoskinson, the court of appeals has gone far beyond this Court's precedents. The Court has never required accommodation where it would require the state to abdicate its own interests. To the contrary, the Court continues to recognize that:

> To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, see, e.g., *Thomas, supra; Sherbert, supra*, but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." *Braunfeld, supra*, at 606, 81 S. Ct. at 1144.

Lee, 455 U.S. at 259. The "point" referred to in the above quote is further explained in *Braunfeld* as the point at which the religious practices conflict with the state's right to legislate for the common good. It is the point at which the practice of religious beliefs collides with the rights asserted by other individuals. "It is such conflicts which most frequently require intervention of the state to determine where the rights of one end and those of another begin." *Braunfeld*, 366 U.S. at 604 (quoting *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 630 (1943)).

Unlike previous cases requiring accommodation, the religious beliefs asserted by DCS collide with the rights asserted by another individual. *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Thomas* v. *Review Board*, 450 U.S. 707 (1981) are both readily distinguished. Mrs. Sherbert and Mr. Thomas were not seeking an exemption to engage in conduct that was otherwise unlawful. Nor was any third party adversely affected as a result of the exemption they received. In this case any further accommodation requires the State to tolerate conduct it has determined to be unlawful, and requires Mrs. Hoskinson, and other similarly situated women, to suffer economic loss as a consequence of having decided to start a family. *Wisconsin* v. *Yoder* is also distinguished on these

grounds. Granting Amish parents a limited exemption from the state's mandatory school attendance law did not preclude attainment of that state's goal because the Amish sect provided equal, if not better, alternative educational opportunities. The Amish, moreover, had substantially complied with the state's school attendance law by permitting the children to attend public schools through the eighth grade.

The court of appeals suggests that granting an exemption to DCS would not significantly interfere with the State's fulfillment of its goals because the State would still be able to regulate the employment practices of nonreligious institutions and of religious institutions except where religious belief is implicated (A-38). To countenance this insignificant numbers rationale is tantamount to finding a little discrimination is acceptable.[7] Such rationale has no support in this Court's precedents. The young Jehovah's Witnesses' religious duty to evangelize on the public streets was curtailed in *Prince* v. *Massachusetts*, even though the percentage of young evangelists was likely very small. The Jewish merchants were not accommodated in *Braunfeld* even though the Sunday closing laws could have been enforced against nonreligious merchants and religious merchants who were Sunday-observers.

The lower court's rationale would require the State to accept all proffered articulations or interpretations of a religious belief, save those that are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause," *Thomas*, 450 U.S. at 715. For example, if the circuit court's decision is not reversed a school that interprets the Bible to support the supremacy of the white race would be free to fire a teacher if it learns the

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[7]The *de minimis* argument is questionable also because the numbers involved are not insignificant. In 1980, there were 12,538 classroom teachers in Ohio's church-related elementary and secondary schools. There were 207,091 teachers in such schools nationally. National Center for Education Statistics, *Digest of Education Statistics 1983-84*, Table 40, p. 48.

teacher has a black ancestor or if the teacher associates socially with members of a different race. A school whose religious beliefs require a woman to be obedient to her husband could terminate a pregnant teacher who sought medical treatment to save the life of her unborn child, after her husband refused his consent.

A myriad of exceptions would likely flow from any holding that religious belief warrants a mandatory, unreviewable constitutional exemption from the civil rights laws. *See Lee*, 455 U.S. at 260; *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981). Acceptance of the lower court's reasons for exempting DCS, that it is pervasively religious and has an asserted religious basis for its challenged employment practices, could also require exemption of any number of private institutions who claim, in an attempt to avoid the Act, their activities are religiously mandated. The ultimate result of the Sixth Circuit's decision is to withdraw all religiously affiliated institutions, and those who will claim to be, from the purview of the Act.

The lower court likewise failed to give any consideration to the qualitative ramifications of its holding. The State's goal of eradicating discrimination in employment is severely undermined in this case because the unlawful discrimination is practiced in a grammar school.[8] In such setting, the State's interest is most apparent. *See Brown* v. *Board of Education; Fellowship Baptist Church* v. *Benton*, 620 F. Supp. 308 (S.D. Iowa 1985); *State ex rel. Douglas* v. *Faith Baptist Church*, 207 Neb. 802, 301 N.W. 2d 571 (1981). As this Court has noted, the legitimate educational function of private religious schools cannot be isolated from discriminatory practices because "discriminatory treatment exerts a pervasive influence on the entire educational process." *Bob Jones University*, 461 U.S.

[8]In 1980 there were 254,063 children enrolled in Ohio's church-related elementary and secondary schools. Nationally there were 4,166,495 children enrolled in such schools. *Digest of Education Statistics 1983-84*, Table 37, p. 46.

at 594 (citing *Norwood* v. *Harrison*, 413 U.S. at 468-469). The qualitative effect of exempting religious schools from the equal employment laws is aptly described by the Fifth Circuit in *EEOC* v. *Mississippi College*, 626 F.2d 477 at 489 (1980):

> Although the number of religious educational institutions is minute in comparison to the number of employers subject to Title VII, their effect on society at large is great because of the role they play in educating society's young. If the environment in which such institutions seek to achieve their religious and educational goals reflects unlawful discrimination, those discriminatory attitudes will be perpetuated with an influential segment of society, the detrimental effect of which cannot be estimated.

See also, (A-108-110). The unavoidable conclusion when these factors are added to the lower court's narrow quantitative analysis is that the cumulative impact of its holding will significantly impair the State's goal of eradicating employment discrimination.

In the presence of a compelling governmental interest, accommodation of a religious belief is only constitutionally mandated to the extent a less restrictive alternative is available. A properly designated less restrictive alternative is one which allows the *attainment* of an objective in a manner which minimizes infringement on a First Amendment activity. The governmental interest at issue here is not limited, as it was in *Bob Jones University*, to simply denying public support to discrimination. The Ohio Act, like its federal counterpart, seeks to end discrimination in employment by declaring such conduct unlawful. The State's interest cannot be attained if any further accommodation is made because DCS seeks nothing less than a full exemption to engage in the precise practice the State has proscribed, discrimination and retaliation by employers against employees. If the State's interest was limited to easing the public conscience by not aiding schools that practice discrimination, denying public benefits might be a reasonable possibility. But here the

State's interest is to assure Mrs. Hoskinson does not have economic and personal decisions thrust upon her because of her sex. This is a legitimate exercise of the State's legislative power to forbid conduct, even though it is based on religious belief, since the prohibition is essential to protect the rights of others. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

IV. APPLICATION OF THE OHIO CIVIL RIGHTS ACT'S PROHIBITIONS AGAINST SEX DISCRIMINATION AND RETALIATORY EMPLOYER CONDUCT TO DCS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE THE PURPOSE AND EFFECT OF THE ACT'S PROHIBITIONS ARE RELIGIOUSLY NEUTRAL AND APPLICATION OF THE ACT WILL NOT IMPERMISSIBLY ENTANGLE THE STATE IN THE SCHOOLS' RELIGIOUS AFFAIRS.

While no single test is required in the Establishment Clause area, the primary analytical tools are the guidelines enunciated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *Lemon* directs inquiry into whether the challenged statute has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive governmental entanglement with religion. It cannot seriously be advanced that the Ohio Civil Rights Act does not have a valid secular purpose. *See, Estate of Thornton* v. *Caldor*, ___ *U.S.* ___, 105 S. Ct. 2914, 2919 (1985) (J. O'Connor concurring). Both the lower courts agreed the Act has a secular legislative purpose and does not have the primary effect of either advancing or inhibiting religion. (A-42; A-114-115). The courts' discussions focused exclusively on whether the application of the Act would impermissibly foster an excessive entanglement with religion. The district court concluded "any fears of excessive government entanglement are minimal," (A-118), whereas the court of appeals concluded "a high degree of entanglement is likely," (A-44).

The court of appeals' conclusion is erroneous because it distorts the entanglement prohibition into an unqualified prohibition. This Court has not held that entanglement between church and state is *per se* unconstitutional. Only that entanglement resulting in the excessive "active involvement of the sovereign in religious activity" is proscribed. *Lemon* v. *Kurtzman*, 403 U.S. at 612. The entanglement that would result from the application of the Act to DCS falls well within the strictures of this qualified standard.

A Application of The Act Will Not Require The State To Become Entangled In DCS' Religious Beliefs.

DCS generally fits the profile of the pervasively religious school well known to this Court through the cases involving the states' efforts to provide monetary support to the secular functions of church-related elementary and secondary schools, *see Lemon* v. *Kurtzman*; *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973); *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and most recently before the Court in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).[9] The character of the institution is not, however, outcome determinative. Consideration must also be given to the extent the statute requires excessive involvement in the institution's religious activity, and it is at this point that the instant case parts company with those cases in which state aid to sectarian institutions resulted in impermissible entanglement. The constitutionally intolerable entanglement that has invalidated state aid to parochial schools has inevitably arisen as a result of the need for "prophylactic contacts" to ensure that such aid is

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[9]DCS may be distinguishable on the fact that it is an "interdenominational" educational institution "not identified or affiliated with any one church or denominational group of churches." (Plaintiffs' Exhibit 7). This distinction, however, makes DCS' establishment clause claims less, not more, persuasive.

used exclusively for secular, neutral and nonideological purposes. *Lemon*, 403 U.S. at 619.

> The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . . To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. . . .
>
> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Id. See also Meek v. *Pittenger*, 421 U.S. 370-372.

Application of the Ohio Civil Rights Act does not entail any comparable comprehensive or continuing state surveillance of the schools' religious activities. Accomplishment of the Act's purpose does not require that the State monitor the schools' religious activity or restrict the inculcation of religious belief. Unlike the regulators in the state aid cases, the commission, in investigating unlawful employment practices, need not be concerned with the teachers' religious beliefs or the content of the curriculum in the classroom. In this instance, for example, the scope of the commission's inquiry would be narrowly restricted to a determination of whether DCS engaged in unlawful discriminatory or retaliatory conduct against Linda Hoskinson. Such inquiry would not entail inquiry into the schools' nonsecular or ideological beliefs or practices. As the record in this case aptly illustrates, the schools' religious beliefs and practices were put at issue only because they were asserted by DCS to be an absolute bar to the exercise of the commission's jurisdiction. *See*, (JA-81) (scope of preliminary investigation), (JA-87) (notice of commission's determination), (JA-100) (Commission's complaint) and (JA-103) (Respondent's Answer). But for the school's claim of an absolute exemption

for conduct predicated upon religious ideology, the commission would have concluded its investigation by applying clearly established neutral principles[10] to determine whether the decision not to renew Mrs. Hoskinson's contract and the decision to terminate her constituted unlawful sex discrimination and retaliation.

In determining whether employers have engaged in unlawful discriminatory practices the Ohio Civil Rights Commission follows the same principles developed by federal case law for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. *Plumbers & Steamfitters Joint Apprentice Committee v. Ohio Civil Rights Commission*, 66 Ohio St. 2d 192, 196, 421 N.E. 2d 128, 131 (1981). Employers may rebut a *prima facie* case of discrimination by articulating "some legitimate *nondiscriminatory* reason for the employee's * * * [discharge]," and such rebuttal requires the complainant to demonstrate the employer's reason for the discharge is a pretext for impermissible discrimination. 66 Ohio St. 2d at 197-198 (emphasis added) (quoting *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802-804 (1973). Should a religious school articulate what it considers to be a legitimate, *nondiscriminatory* religious reason for its employment action, the commission would apply neutral evidentiary principles to determine whether that reason was the real reason for the decision or whether the action in fact was motivated by the employee's sex, race, age or national origin. The commission

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[10]The Court's treatment of the First Amendment's limitations on the states' ability to adjudicate church property disputes is a helpful analogy. The Court has held that while "the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice", the state may intervene in such disputes to the extent that they can be resolved by applying "neutral principles of law." *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979) "The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods." *Id.* 443 U.S. at 606. (Emphasis added.)

would not be required to delve into the school's religious tenets or the sincerity of its beliefs. *See, e.g., Dolter* v. *Wahlert High School,* 483 F. Supp. 266 at 270 (N.D. Iowa 1980). The court below erred, therefore, in finding impermissible entanglement because its conclusion rested on its assumption that the commission's proceedings would *necessarily* raise issues of religious motivation and good faith. (A-49). No such inquiries are necessary in investigations conducted under the Ohio Act or Title VII. It is, therefore, only the granting of a religious exemption, not the denial of such exemption, that places questions of religious ideology at issue.

The Sixth Circuit's decision creates impermissible religious entanglement where none would exist otherwise. After the Sixth Circuit's holding, if charges are filed against a religious employer alleging nonreligious grounds for discrimination and the employer articulates religious reasons as the basis for the decision, the Commission has two choices.[11] It must either cease the investigation immediately upon the employer's articulation of religious reasons for its decision, or it must delve into the sincerity of the religious belief to determine whether the employer should be exempted from the operation of the statute. This result is certainly unacceptable for it neither protects religious freedom nor accomplishes the State's interest.

B. Application Of The Act Will Not Require Comprehensive Or Continuing Surveillance.

The court of appeals' conclusion that the church/state relationship would be excessively entangling was based on certain critical misperceptions of the scope of the Act and the commission's duties in administering it. The court focused on what it termed "OCRC's agressive pursuit of DCS" and "the entire panoply of statutory entanglements from the proposed

[11]The court below recognized its holding would leave the commission with this dilemna, but left the question unresolved. (A-38, note 41).

consent order to the spector of judicial enforcement proceedings." (A-48, 49). The lower court's conclusion must be questioned given the court's persistent refusal to recognize that the proposed consent order was just what it purported to be, a proposal only. The commission is required by Ohio Rev. Code §4112.05(B) to endeavor to eliminate unlawful discriminatory practices "by informal methods of conference, conciliation, and persuasion." The commission sent the proposed consent order to DCS to start the negotiation process. (JA-85). DCS was free to reject the conciliation proposal in its entirety, as it did, or to make a counter offer, as it was encouraged to do by the commission. (JA-44). Since the proposed consent order was rejected by DCS in its entirety, the terms of that proposed order lend no support to the court's conclusion that continuing or comprehensive surveillance was likely.

Even assuming some of the record-keeping or compliance terms recited in the proposed order ultimately could appear in an adjudication order issued by the commission after hearing, a finding of impermissible entanglement is nonetheless unwarranted. The commission's complaint does not allege a "pattern and practice" of discrimination, it alleges individual disparate treatment and, therefore, the remedy would necessarily be limited to an attempt to make Linda Hoskinson whole for the discrimination she suffered. The possibility that the commission might seek even extensive compliance reports, or seek to conduct on-site compliance reviews, therefore, is remote. Even if these actions were taken, they would not give rise to constitutionally prohibited entanglement. The test requires both a finding that the entanglement is excessive and a finding that there is entanglement in religion. Any mandated compliance surveillance would be limited by statute to the question of prohibited employment discrimination. Any continuing surveillance would threaten no more entanglement than that

threatened by other religiously neutral governmental regulations.[12] Moreover, any adjudication order issued by the commission would be subject to judicial review under Ohio Rev. Code §4112.06, and the reviewing court could "grant such temporary relief or restraining order as it deems just and proper" or could enter an order "modifying" or "setting aside in whole or in part, the order of the commission." The statutory procedure, therefore, provides ample protection from excessive entanglement without having to resort to the speculative, all-or-nothing analysis in which the Sixth Circuit indulged. Had the court below allowed Mrs. Hoskinson's charge to proceed to administrative resolution, there would have been a focused opportunity to evaluate the entanglement issue. *Cf. Grutka* v. *Barbour,* 549 F.2d 5, 9 (7th Cir. 1977), *cert. denied,* 431 U.S. 908 (1977) (district court erred in enjoining hearing concerning unfair labor practice brought by lay teachers in parochial schools, "[s]ince the dimension of state-church entanglement can only be intelligently assessed against a developed factual background"). If the resulting entanglement was found to be excessive and religiously intrusive, the commission's remedial powers could have been pared into constitutional compliance. This approach has been used to save state statutes benefitting religion. *See Tilton* v. *Richardson,* 403 U.S. 672 (1971). Similar

[12]By virtue of its state charter, DCS is subject to extensive continuing surveillance by the state department of education. Nonpublic schools chartered by the state board of education must comply with rules applicable to all schools, except those relating to the schedule for the school day, minimum units, pupil-teacher ratio, library expenditures and community relations, Ohio Admin. Code §3301-35-04, (a-25), or unless an exception is granted by the state board of education "upon evidence of good and sufficient reason," Ohio Admin. Code §3301-35-07(B), (a-29). Pursuant to Ohio Admin. Code §3301-35-07(A), schools are to be evaluated at least once every five years to determine compliance with the board's rules. The evaluation reports are subject to review at public meetings, and a plan to correct deficiences must be submitted to the state department of education, which may engage in onsite verification to review the school's progress in correcting deficiences. (a-28).

restraint is appropriate to preserve the state's power to regulate religious institutions, especially where the state's regulatory interest is compelling.

C. Application Of The Act Will Not Threaten The Schools' Autonomy.

NLRB v. *Catholic Bishop of Chicago,* 559 F. 2d 1112 (7th Cir. 1977), *aff'd on other grounds,* 440 U.S. 490 (1979) is distinguished on the same grounds as that court relied heavily on the state aid cases. As this Court noted on review, the National Labor Relations Board has extensive jurisdiction not only to hear and decide unfair labor practices but also to decide what are terms and conditions of employment subject to mandatory collective bargaining. 440 U.S. at 502-503. It was this Court's concern that "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment'," 440 U.S. 503 (quoting *Springfield School Dist., No. 19,* 24 Ore. App. 751, 759, 547 P. 2d 647, 650 (1976)), that prompted its conclusion that the exercise of that Board's jurisdiction over church-operated schools would give rise to serious constitutional questions.

Application of the Ohio Civil Rights Act does not threaten any comparable encroachment on the religious administration of the schools. The only limitation the Act imposes on the administrators' autonomy to run the schools is the requirement that it not engage in unlawful discriminatory employment practices. The school is not required to share general decision-making authority with the commission or any other third party. The administrators are free to make their decisions on religious grounds, nonreligious grounds, whim or fancy, so long as those decisions do not unlawfully discriminate among employees on the basis of sex, race, or one of the other protected classifications. As a result, the likelihood, magnitude, frequency or duration of any entanglement is much more narrowly circumscribed under the discrimination laws than under the labor relations act.

NLRB v. *Catholic Bishop* has been argued as precedent in cases involving the application of employment discrimination laws and each time has been clearly distinguished. *See EEOC* v. *Pacific Press Publishing Association*, 676 F. 2d 1272 (9th Cir. 1982); *Russell* v. *Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982); *Dolter* v. *Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980).

D. Any Entanglement Resulting From The Application Of The Act To DCS Is Justified By The State's Compelling Interest.

The Court has indicated that even statutes granting "denominational preferences of the sort consistently and firmly deprecated in [its] precedents," might be justified if "closely fitted to a compelling governmental interest." *Larson* v. *Valente*, 456 U.S. 228, 246-247 (1982). No less deference should be afforded to statutes challenged only on the grounds that they result in excessive entanglement. Even assuming the Court should find application of the Act will entangle the State in DCS' religious affairs, the Court should apply the strict scrutiny test as it does in the free exercise area. For the reasons discussed in Parts III-B and III-C, the Court should nonetheless uphold the Act because its application to DCS is essential to furthering the State's compelling interest in eradicating sex discrimination in the employment context.

V. EXEMPTION IN THIS CASE WILL PREFER RELIGIONS WHOSE BELIEFS CONFLICT WITH STATE LAW.

If any establishment clause violation is threatened here, it is by exempting DCS because of its religious beliefs rather than by applying Ohio's anti-discrimination laws uniformly to all employers. Application of the Ohio Civil Rights Act to DCS would result only in the application of a facially neutral

statute directed at ending sex based discrimination. In contrast, when the Sixth Circuit "accommodated" DCS by immunizing the schools from complying with the Ohio statute, the court enacted a preference for religiously affiliated employers whose espoused beliefs run contrary to law over secular employers and over religious employers whose beliefs comport with law. By virtue of the lower court's decision, DCS has been afforded the license to ignore Ohio's law against discrimination whereas other sects and nonreligious employers cannot. This Court has historically rejected such notions of governmental partiality, *see, e.g., Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), because such official preferences are the precise evils the Establishment Clause seeks to avoid. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially prefered over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982).

CONCLUSION

The decision of the circuit court should be reversed and the cause remanded with instructions to affirm the district court's judgment of January 6, 1984, denying Appellees' application for a permanent injunction.

Respectfully submitted,

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APPENDIX TO BRIEF FOR APPELLANTS

OHIO REVISED CODE §2151.421 (Page, 1984 Supp.)

Any attorney, physician, including a hospital intern or resident, dentist, podiatrist, practioner of a limited branch of medicine or surgery as defined in section 4731.15 of the Revised Code, registered or licensed practical nurse, visiting nurse, or other health care professional, licensed psychologist, speech pathologist or audiologist, coroner, administrator or employee of a child day-care center, or administrator or employee of a certified child care agency or other public or private children services agency, school teacher or school authority, social worker, or person rendering spiritual treatment through prayer in accordance with the tenets of a well recognized religion, acting in his official or professional capacity, having reason to believe that a child less than eighteen years of age or any crippled or otherwise physically or mentally handicapped child under twenty-one years of age has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of the child, shall immediately report or cause reports to be made of such information to the children services board or the county department of human services exercising the children services function, or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred.

Anyone having reason to believe that a child less than eighteen years of age or any crippled or otherwise physically or mentally handicapped child under twenty-one years of age has suffered any wound, injury, disability, or other condition of such nature as to reasonably indicate abuse or neglect of the child may report or cause reports to be made of such information to the children services board or the county department of human services exercising the children services function, or to a municipal or county peace officer.

The reports shall be made forthwith by telephone or in person forthwith, and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(A) The names and addresses of the child and his parents or person or persons having custody of such child, if known;

(B) The child's age and the nature and extent of the child's injuries, abuse, or neglect, including any evidence of previous injuries, abuse, or neglect;

(C) Any other information which might be helpful in establishing the cause of the injury, abuse, or neglect.

Any person who is required to report cases of child abuse or neglect may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child.

When the attendance of the physician is pursuant to the performance of services as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution or his designated delegate who shall make the necessary reports.

Upon the receipt of a report concerning the possible abuse or neglect of a child, the municipal or county peace officer shall refer such report to the appropriate county department of human services or children services board.

No child upon whom a report is made shall be removed from his parents, stepparents, guardian, or other persons having custody by a municipal or county peace officer without consultation with the children services board or the county department of human services exercising the children

services function unless, in the judgment of the reporting physician and the officer, immediate removal is considered essential to protect the child from further abuse or neglect.

The county department of human services or children services board shall investigate, within twenty-four hours, each report referred to it under this section to determine the circumstances surrounding the injury or injuries, abuse, or neglect, the cause thereof, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency. The county department of human services or children services board shall report each case to a central registry which the state department of human services shall maintain in order to determine whether prior reports have been made in other counties concerning the child or other principals in the case. The department or board shall shall submit a report of its investigation, in writing to the law enforcement agency.

The county department of human services or children services board shall make such recommendations to the county prosecutor or city director of law as it deems necessary to protect such children as are brought to its attention.

Anyone or any hospital, institution, school, health department, or agency participating in the making of the reports, or anyone participating in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of such actions. Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause thereof in any judicial proceeding resulting from a report submitted pursuant to this section.

Nothing in this section shall be construed to define as an abused or neglected child any child who is under spiritual treatment through prayer in accordance with the tenets and practice of a well-recognized religion in lieu of medical treatment.

Any report made under this section is confidential, and any person who permits or encourages the unauthorized dissemination of its contents is guilty of a misdemeanor of the fourth degree.

Reports required by this section shall result in protective services and emergency supportive services being made available by the county department of human services or children services board on behalf of children about whom the reports are made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The department of human services shall exercise rule-making authority under Chapter 119. of the Revised Code to aid in the implementation of this section.

There shall be placed on file with the juvenile court in each county and the department of human services an initial plan of cooperation jointly prepared and subscribed to by a committee consisting of the county peace officer, all chief municipal peace officers within the county, the prosecuting attorney of the county and the director of law of each city, and the children services board or county department of human services exercising the children services function as convened by the county director of human services. The plan shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilites under this section and section 2151.41 of the Revised Code. The plan shall include a system for cross-referral of reported cases of abuse and neglect as necessary, and shall also include the name and title of the official directly responsible for making reports to the central registry.

OHIO ADMINISTRATIVE CODE

§3301-35-01 Definitions

The following terms are defined as they are used in these rules.

(A) "Board of education" - the elected governing body of a school district or the governing body of a nonpublic school.

(B) "Certificated staff" - school personnel who have been assigned positions which require a certificate in accordance with section 3319.30 of the Revised Code.

(C) "Classified staff" - school personnel who are assigned to positions under section 3317.12 of the Revised Code.

(D) "Educational option" - experiences or activities which may be provided in accordance with board policy to supplement the regular school program scheduled for pupils. Such options may include:

(1) "Correspondence course" - systematic instruction by mail or electronic media between a pupil and instructor in accordance with board policy.

(2) "Educational travel" - an educational activity involving travel in accordance with board policy under the direction of a person approved by the board and parent.

(3) "Independent study" - an educational activity involving advanced or indepth work by an individual pupil under the direction of a certified member of the school staff in accordance with board policy.

(4) "Mentor program" - an educational activity including advanced or indepth work by an individual pupil in accordance with board policy under the direction of a

noncertificated individual. Mentors shall be individuals selected in accordance with board criteria and subject to parent approval.

(5) "Tutorial program" - an educational activity involving work by an individual pupil under the direction of a certificated teacher in accordance with board policy.

(E) "Intervention" - alternative or supplemental action designed to remediate, reinforce, or support pupil learning relative to specified performance objectives.

(F) "Parent" - A person or government agency having responsibility for a child as defined by section 3321.01 of the Revised Code.

(G) "Policies" - principles governing the operation of the school. Policies shall be established and adopted by the board of education.

(H) "Procedures" - an administrative course of action specified in writing.

(I) "Pupil activity programs" - school sponsored non-credit activities which are beyond the scope of the prescribed courses of study but are provided school supervision and support. Pupil activity programs include but need not be limited to performance groups, interscholastic activities, and school clubs.

(J) "Pupil performance objectives" - statements derived from prescribed goals and objectives delineating expected student outcomes as observable behaviors or products of behavior.

(K) "Superintendent" - chief administrative officer of a school district or the chief administrative officer of a non-public school.

Effective: September 1, 1983

OHIO ADMINISTRATIVE CODE

§3301-35-02 Educational Program

The kindergarten through twelfth grade educational program shall be implemented in accordance with adopted policies which cover paragraphs (A) to (E) of this rule. Board policies shall be available to parents, pupils, and school personnel.

(A) A written philosophy of education and educational goals shall give direction to the educational program and shall provide a basis for daily operations.

(1) The educational program shall be provided without discrimination on the basis of color, national origin, race, or sex,.

(2) The philosophy of education and educational goals shall reflect pupil interests and needs identified by broad representation of community, pupils, and staff.

(B) Curriculum and instruction shall be characterized by systematic planning, articulation, implementation, and evaluation.

(1) Courses of study shall establish the basis for curriculum and instruction.

(a) A course of study shall be adopted for each subject taught. Each course of study shall:

(i) Comply with the provisions of section 3313.60 of the Revised Code;

(ii) Be based on the philosophy of education and educational goals;

(iii) Prescribe what is to be taught;

(iv) Specify subject matter objectives;

(v) Establish a scope and sequence;

vi) Provide a basis for pupil evaluation.

(b) Courses of study shall provide for the following topics to be a part of the curriculum: career education, citizenship, human relations education, multicultural education, energy and resource conservation education, and instruction in study skills.

(c) Courses of study shall be reviewed and updated at least once every five years.

(2) Locally developed competency based education programs shall be implemented for English composition, mathematics, and reading.

(a) Pupil performance objectives shall be established for English composition, mathematics, and reading.

(b) Provisions shall be made for periodic assessment of pupil performance, including testing at least once in grades one through four, grades five through eight, and grades nine through eleven.

(c) Guidelines shall be established for the use of assessment results for instruction, evaluation, intervention, guidance, and promotion decisions.

(d) Intervention shall be provided according to pupil needs.

(e) Written policies and procedures shall be adopted by the board of education regarding

the participation of handicapped pupils in locally developed competency based education programs. Provisions may be made for exemption of individual handicapped pupils from the requirements of the locally developed competency based education programs.

(f) Implementation of competency based education in English composition, mathematics, and reading shall begin no later than the 1984-85 school year, with full implementation to be completed no later than the 1989-90 school year.

(g) Competency based education programs shall be reviewed and updated at least once every five years.

(3) Daily lesson plans shall give direction for instruction and implementation of courses of study.

(4) Pupil achievement shall be monitored according to established procedures.

(a) Reports of pupil progress shall be made to parents at established intervals.

(i) An interim report shall be made to parents when pupil progress is unsatisfactory.

(ii) Parents shall be notified of problems with pupil conduct or attendance according to established procedures.

(b) Pupil records shall be safeguarded according to sections 1347.99 and 3319.321 of the Revised Code.

(5) Criteria for decisions on pupil promotion and

retention shall include a requirement that pupils complete one year of American history and one-half year of Ohio studies for promotion from the eighth grade.

(6) Requirements for high school graduation shall include eighteen units earned in grades nine through twelve and shall be distributed as follows:

(a) English language arts, three units;

(b) Health, one-half unit;

(c) Mathematics, two units;

(d) Physical education, one-half unit;

(e) Science, one unit;

(f) Social studies, two units which shall include:

(i) American history, one-half unit, and

(ii) American government, one-half unit;

(g) Elective units, nine.

(h) Each pupil shall be required to complete three units in another subject in addition to the English requirement stated in paragraph (B)(6)(a) of this rule.

The effective date of this requirement shall be September 1, 1987.

(7) Diplomas shall be issued to pupils who complete graduation requirements in accordance with the provisions of paragraph (B)(6) of this rule and section 3313.61 of the Revised Code.

(8) Requirements for awarding credit to pupils who successfully complete courses in grades nine through twelve:

(a) Shall specify that a minimum of one hundred twenty hours be scheduled for one unit of credit with the following exceptions:

(i) Laboratory courses shall be scheduled for a minimum of one hundred fifty hours for one unit of credit;

(ii) Physical education courses shall be scheduled for a minimum of one hundred twenty hours for one-half unit of credit;

(b) Shall specify that credit courses have at least two meetings per week;

(c) Shall specify that a fractional unit of credit be awarded on a proportionate basis for a course scheduled to meet less than the minimum time required for one unit of credit;

(d) May permit more than one unit of credit to be awarded on a proportionate basis for a course scheduled for more than one hundred twenty hours;

(e) May permit pupils below the ninth grade to take advanced work for credit, but such credit may not be considered in calculating the eighteen units required for high school graduation in paragraph (B)(6) of this rule.

(9) Each building shall be open for instruction with pupils in attendance according to sections 3313.48 to 3313.482, 3313.484, and 3313.485 of the Revised Code, whichever section is applicable.

(10) Scheduled classes, supervised activities, or approved educational options for kindergarten pupils shall be provided for the equivalent of at least two and one-half hours a day throughout the year.

(a) A minimum of two hundred minutes per week shall be allocated for readiness activities in handwriting, mathematics and reading.

(b) The balance of time shall be allocated for art, English language arts, health, music, physical education, science, and social studies.

(11) The school day for pupils in grades one through six shall consist of scheduled classes, supervised activities, or approved educational options for at least five hours exclusive of the lunch period.

(a) A minimum of eleven hundred minutes per week shall be allocated at each grade level for planned instruction in English language arts, health, mathematics, reading, science, and social studies. Foreign language instruction may be included in the eleven hundred minutes.

(b) A minimum of two hundred minutes per week shall be allocated at each grade level for planned instruction in art, music, and physical education.

(c) Weekly time allocations may be modified, except for English language arts, mathematics, and reading, provided pupils complete an equivalent amount of time on an annual basis as specified in paragraphs (B)(11)(a) and (B)(11)(b) of this rule.

(12) The school day for pupils in grades seven and

eight shall consist of scheduled classes, supervised activities excluding interscholastic athletics, or approved educational options for at least five and one-half hours exclusive of the lunch period.

(a) Seventh and eighth grade pupils shall be scheduled for planned instruction the equivalent of at least one thousand minutes per week for the following:

(i) English language arts;

(ii) Mathematics;

(iii) Reading of foreign language;

(iv) Science;

(v) Social studies.

(b) Seventh and eighth grade pupils shall be scheduled for planned instruction the equivalent of at least eighty minutes per week in physical education.

(c) Seventh or eighth grade pupils shall be scheduled for planned instruction the equivalent of at least eighty minutes per week in each of the following:

(i) Art;

(ii) Health;

(iii) Music.

(d) The remainder of the minimum school week for seventh and eighth grade pupils may be allocated for planned instruction in subjects

specified in paragraphs (B)(12)(a) to (B)(12)(c) of this rule or in subjects such as:

(I) Business education which may include typewriting or keyboarding;

(ii) Computer science;

(iii) Home economics;

(iv) Industrial arts.

(13) The school day for pupils in grades nine through twelve shall consist of scheduled classes, supervised activities excluding interscholastic athletics, or approved educational options for at least five and one-half hours exclusive of the lunch period.

(a) A minimum of forty-five units shall be scheduled and operated in separately organized classes each year.

(b) The forty-five units shall be distributed as follows:

(i) Business or vocational business, two units of which at least one-half unit shall be typewriting or keyboarding;

(ii) Economics, one-half unit;

(iii) English launguage arts, four and one-half units;

(iv) Fine arts, four units of which at least one unit shall be art and one unit shall be music;

(v) Foreign language, three units of one foreign language is scheduled; or two

units each if two foreign languages are scheduled;

(vi) Health, one-half unit;

(vii) Home economics or vocational home economics, two units;

(viii) Industrial arts, two units;

(ix) Mathematics, four units;

(x) Physical education, one-half unit;

(xi) Reading, one-half unit;

(xii) Science, four units, including at least two laboratory courses;

(xiii) Social studies, two and one-half units, including one-half unit of American history and one-half unit of American government;

(xiv) Fifteen units unspecified which may include twelve units which pupils may earn in vocational courses either at the home school or a vocational school.

(C) Educational options may be made available to pupils.

(1) The superintendent may approve an educational option upon evidence that:

(a) The parent has approved participation for any pupil under the age of eighteen;

(b) An instructional plan has been submitted

prior to pupil participation. The instructional plan shall include:

(i) Instructional objectives;

(ii) An outline including major instructional activities, materials, and environments;

(iii) A description of criteria and methods for assessing pupil performance;

(c) A certified teacher shall provide instruction and evaluate pupil performance in tutorial programs and independent studies;

(d) A certificated teacher shall evaluate pupil performance in correspondence courses, educational travel, and mentor programs.

(2) Promotion and retention decisions regarding pupils in kindergarten through eighth grade shall consider pupil performance relative to the objectives of an option.

(3) A maximum of six units of credit may be applied toward the eighteen units required for graduation in paragraph (B)(6) of this rule. No more than four of the six units may be applied toward requirements specified in paragraphs (B)(6)(a) to (B)(6)(f) of this rule.

(D) An experimental program may be provided to meet the identified needs of pupils subject to prior approval by the Ohio department of education.

(E) The educational program provided in accordance with paragraphs (A) to (E) of this rule shall be evaluated at least once every five years. Evaluation procedurs shall be conducted according to professionally recognized criteria and procedures.

Effective: September 1, 1983

OHIO ADMINISTRATIVE CODE
§3301-35-03 Educational Resources

Resources for implementation of the educational program shall be allocated in accordance with adopted policies which cover paragraphs (A) to (K) of this rule. Board policies shall be available to parents, pupils, and school personnel.

(A) Certificated and classified staff shall be recruited, employed, assigned, evaluated, and provided inservice education without discrimination on the basis of age, color, national origin, race, or sex.

(1) Certificated and classified staff shall be assigned responsibilities in accordance with written position descriptions commensurate with their certification and qualifications, respectively.

(2) Each certificated staff member shall hold the appropriate type certificate with respects to assigned position in accordance with section 3319.22 or 3301.071 of the Revised Code. Copies of certificates appropriate to assignments shall be on file in the administrative office.

Certificated staff holding elementary certificates may be assigned to grades seven and eight. Certificated staff holding secondary certificates may be assigned to grades seven and eight to teach the subjects for which certification is held.

(3) The ratio of teachers to pupils on a districtwide basis shall be at least one full-time equivalent classroom teacher per twenty-five pupils in average daily membership. Said ratio shall be calculated in accordance with sections 3317.02 and 3317.023 of the Revised Code.

The ratio of teachers to pupils in kindergarten through fourth grade on a districtwide basis shall be at least one

full-time equivalent classroom teacher per twenty-five pupils in average daily membership. Said ratio shall be calculated in accordance with sections 3317.02 and 3317.023 of the Revised Code. The effective date of this requirement shall be September 1, 1986.

(4) A minimum of five full-time equivalent educational service personnel shall be employed on a district-wide basis for each one thousand pupils in average daily membership. Said ratio shall be calculated in accordance with sections 3317.02 and 3317.023 of the Revised Code.

Educational service personnel shall be assigned to at least five of seven areas: counselor, librarian, school nurse, visiting teacher, and elementary art, music, and physical education. Educational service personnel assigned to elementary art, music, and physical education shall hold the special teaching certificate in the subject assigned.

(5) Each school shall be provided the services of a principal. Each school with fifteen or more full-time equivalent classroom teachers shall be assigned the services of a full-time principal. A principal shall be assigned to no more than two schools.

(6) Curriculum supervision shall be provided to assist in the improvement of the instructional program.

(7) Each school shall be provided clerical and custodial services.

(8) Certificated and classified staff shall be supervised and evaluated according to a planned sequence of observations and evaluation conferences.

(9) Certificated and classified staff shall have opportunities to participate in inservice education, which shall include:

(a) Cooperative planning, implementation, and evaluation;

(b) Job-related training in areas of need identified in personnel evaluations;

(c) Orientation activities for new employees.

Annual inservice education for certificated staff shall include instructional methods, subject matter updates, and strategies for preventing and correcting disruptive behavior.

(10) Records shall be maintained on staff participation in inservice education and educational program development.

(11) Staff shall have access to a professional library.

(12) The schedule for each full-time equivalent classroom teacher, who is assigned to a school with a teacher day of six hours or longer exclusive of the lunch period, shall include at least two hundred minutes per week for instructional planning and evaluation and conferences.

(B) Instructional materials and equipment shall support attainment of objectives specified in coures of study.

(1) Instructional materials, textbooks, and equipment shall be available for teacher and pupil use at each grade level.

(a) Instructional materials, textbooks, and equipment shall be selected according to adopted policies with the involvement of certificated staff.

(b) Instructional materials, textbooks, and equipment shall be current.

(2) A library shall be provided in each school.

(a) The library collection shall:

(i) Be selected according to adopted policies with the involvement of certificated staff;

(ii) Include materials which support attainment of objectives specified in courses of study;

(iii) Include materials appropriate to pupil ages, interests, and educational needs;

(iv) Include current reference materials with at least one set of encyclopedia having a copyright date within the past five years;

(v) Be inventoried and cataloged centrally according to a nationally recognized system;

(vi) Be organized for convenient accessibility.

(b) Each library shall be staffed by a certificated librarian or by an aide or volunteer supervised by a certificated librarian. Library services shall be available throughout the school day.

(c) Library services shall include provisions for:

(i) Instruction of pupils in library skills;

(ii) Instruction of certificated staff in the use of library services and the production of instructional materials.

(d) Annual school year district expenditures for library materials and equipment shall amount to at least one-half of one per cent of the total general fund expenditures for regular instruction for the previous school year as entered on "Form 625, Ohio Common Core Data."

(C) Facilities shall accommodate the enrollment and the philosophy of education and educational goals of the school.

(1)Facilities shall be of a quality and quantity to support pupil learning relative to objectives specified in courses of study. Facilities for guidance and counseling shall be of quality and quantity to implement the district plan for guidance services. First aid facilities and space for temporary placement or isolation of injured or ill pupils shall be provided.

(2) Facilities shall be available to support the work of certificated staff and shall include work space, filing facilities, access to a telephone, and access to a room for private conferences.

(3) School facilities and grounds shall be well-maintained, free from hazards, and in compliance with fire and safety laws and regulations as evidenced by:

(a) Reports of annual school fire inspections as conducted by the appropriate local authority;

(b) Reports of annual school health inspections as conducted by the appropriate local authority;

(D) Pupil health and safety shall be safeguarded by an organized program of school health services designed to identify pupil health problems and to coordinate school and community health resources for pupils, as evidenced by but not limited to:

(1) Compliance with immunization requirements of section 3313.67 of the Revised Code;

(2) Compliance with emergency medical authorization requirements of section 3313.712 of the Revised Code;

(3) Screening procedures to identify pupils with vision and hearing problems and a program of health counseling, referral, and follow-up;

(4) Procedures for emergency situations including fire drills, rapid dismissals, and tornado drills in accordance with section 3737.73 of the Revised Code;

(5) Records of monthly fire drills or rapid dismissals and records of tornado drills;

(6) Emergency procedures posted in classrooms and available to parents, pupils, and school personnel;

(7) Emergency telephone numbers posted by each telephone;

(8) Supervision of school grounds, play areas, and other facilities when scheduled for pupil use;

(9) First aid facilities and materials.

(E) Pupil cumulative records shall be maintained.

(F) Pupil admission, placement, and withdrawal shall be processed according to established procedures.

(1) Admission of pupils to kindergarten and grade one shall be in accordance with section 3321.01 of the Revised Code.

(2) Grade placement and units of credit shall be accepted for pupils transferring from any school in the state of Ohio which is in compliance with Chapter 3301-35 of the Administrative Code and from any out-of-state school approved by a state department of education or the equivalent for schools attended in a foreign country.

Credit for foreign exchange studies may be assigned in accordance with paragraph (B)(8) of Rule 3301-35-02 of the Administrative Code.

(G) Pupil attendance and conduct shall be administered according to established objectives and procedures.

(1) Pupil attendance shall be administered in accordance with section 3321.04 of the Revised Code.

(2) Pupil conduct shall be governed by a code of conduct. The code of conduct shall:

(a) Specify expectations for pupil attendance and conduct;

(b) Specify procedures, corrective measures, and penalties regarding code of conduct violations;

(c) Safeguard pupil due process rights;

(d) Be available to parents, pupils, and school personnel;

(e) Be posted in accordance with section 3313.661 of the Revised Code.

(H) School guidance services shall be provided for pupils in kindergarten through twelfth grade in accordance with a written plan adopted by the board of education.

(1) School guidance services shall include:

(a) Systematic aid to pupils regarding educational, career, civic, personal, and social concerns including the harmful effects of drugs, alcohol, and tobacco;

(b) Appraisal, counseling, educational and career planning, referral, and staff consultations.

Counseling services shall be provided by a certificated school counselor.

(I) Pupil activity programs shall be operated in accordance with the philosophy of education and educational goals and shall safeguard the interests of the school, participants, and spectators. Schools shall not sponsor interscholastic athletics for pupils in kindergarten through sixth grade.

(J) A planned community relations program shall be implemented to encourage citizen participation in and support for the educational program. The community relations program shall give evidence of efforts to:

(1) Encourage citizen participation in school functions in accordance with the philosophy of education and educational goals;

(2) Communicate educational program goals, strengths, and needs;

(3) Provide information regarding school activities and pupils accomplishments;

(4) Enlist community resources to support the educational program;

(5) Utilize the services of volunteers who are assigned responsibilities consistent with their qualifications and experience and who are supervised by appropriate school personnel.

(K) Educational resource allocation in accordance with paragraphs (A) to (J) of this rule shall be evaluated at least once every five years. Evaluation procedures shall be conducted according to professinally recognized criteria and procedures.

Effective: September 1, 1983

OHIO ADMINISTRATIVE CODE
§3301-35-04 Nonpublic School

A nonpublic school chartered by the state board of education shall comply with rules 3301-35-01 to 3301-35-03 of the Administrative Code, with the following modifications:

(A) Paragraph (B)(12) of Rule 3301-35-02 of the Administrative Code, school day for grades seven and eight, shall apply as follows:

The school day for pupils in grades seven and eight shall consist of scheduled classes, supervised activities and excluding interscholastic athletics, or approved educational options for at least five hours exclusive of the lunch period.

(B) Paragraph (B)(13) of Rule 3301-35-02 of the Administrative Code, school day for grades nine through twelve, shall apply as follows:

(1) The school day for pupils in grades nine through twelve shall consist of scheduled classes, supervised activities excluding interscholastic athletics,

or approved educational options for at least five hours exclusive of the lunch period.

(2) A minimum of thirty-three units shall be scheduled and operated in separately organized classes each year. The thirty-three units shall be distributed as follows:

(a) Business or vocational business, two units of which at least one-half unit shall be typewriting or keyboarding;

(b) Economics, one-half unit;

(c) English language arts, four and one-half units;

(d) Fine arts, four units of which at least one unit shall be art and one unit shall be music;

(e) Foreign language, three units if one foreign language is scheduled; or two units each if two foreign languages are scheduled;

(f) Health, one-half unit;

(g) Home economics or vocational home economics, two units;

(h) Industrial arts, two units;

(i) Mathematics, four units;

(j) Physical education, one-half unit;

(k) Reading, one-half unit;

(l) Science, four units, including at least two laboratory courses;

(m) Social studies, two and one-half units, including one-half unit of American history and one-half unit of American government;

(n) Electives, three units.

(C) Paragraphs (A)(3) and (A)(4) of rule 3301-35-03 of the Administrative Code, pupil-teacher ratio and educational service personnel, shall not apply.

(D) Paragraph (B)(2)(d) of rule 3301-35-03 of the Administrative Code, library expenditures, shall not apply.

(E) Paragraph (J) of rule 3301-35-03 of the Administrative Code, community relations, shall not apply.

Effective: September 1, 1983

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OHIO ADMINISTRATIVE CODE
§3301-35-06 Procedure For Beginning A New School and When Changing Location or Ownership of a School

(A) A new school may be established and operated for a specified period in accordance with the following procedures, provided the school has at least three grade levels or fifteen pupils.

(1) The superintendent shall initiate contact with the Ohio department of education regarding plans for beginning a school.

(2) The Ohio department of education shall provide copies of minimum standards and procedures for beginning a school.

(3) The superintendent shall submit a plan for attaining compliance with minimum standards to the Ohio department of education. The plan shall include:

(a) Objectives related to minimum standards;

(b) A timeline for attaining compliance with minimum standards.

Nonpublic schools shall comply with rules 3301-39-01 to 3301-39-04 of the Administrative Code, "Rules On Racially Nondiscriminatory Policies And Practices For Nonpublic Schools."

(4) A new school may operate under a letter of approval issued by the Ohio department of education subsequent to an onsite evaluation of the school relative to a school plan. A new school may be approved to operate according to a plan for a period not to exceed four years.

(5) The superintendent of public instruction may recommend to the state board of education that a charter be granted when an onsite evaluation indicates that a school is in compliance with minimum standards.

(B) A change in location or ownership of any school shall be reported to the Ohio department of education. A change in location or ownership shall render a charter null and void.

Effective: September 1, 1983

OHIO ADMINISTRATIVE CODE
§3301-35-07 Procedures For Evaluations

(A) A school shall be evaluated at least once every five years to determine compliance with rules 3301-35-01 to 3301-35-06 of the Administrative Code.

(1) The superintendent shall be informed of evaluation dates and procedures.

(2) A written report of the results of the school evaluation shall be mailed to the superintendent, the principal, and the president of the board of education. The evaluation report shall specify any deficiencies and dates by which corrections will be required.

The principal shall notify parents and other interested parties of a public meeting to be held within thirty days of receipt of the evaluation report. The purpose of the meeting would be to discuss the results of the school evaluation.

(3) A plan to correct deficiences shall be prepared and submitted to the Ohio department of education.

(4) Onsite verification may be conducted to review progress regarding the correction of deficiencies.

(5) An extension of the timeline or alternate means for correction of deficiencies may be approved by the state board of education.

(6) The Ohio department of education shall make public notice of any deficiencies which have not been corrected by the times specified in the evaluation report. Failure to comply with rules 3301-35-01 to 3301-35-06 of the Administrative Code shall be cause for initiating charter revocation proceedings in accordance with section 3301.16 of the Revised Code and Chapter 119. of the Revised Code.

(B) Exceptions to the provisions of rules 3301-35-01 to 3301-35-06 of the Administrative Code may be granted by the state board of education upon evidence of good and sufficient reason.

Effective: September 1, 1983

OHIO ADMINISTRATIVE CODE
§3301-35-08 Non-Chartered, Non-Tax Supported School

A school, which is not chartered or seeking a charter from the state board of education because of truly held religious beliefs, shall annually certify in a report to the parents of its pupils that the school meets Ohio minimum standards for non-chartered, non-tax supported schools cited in paragraphs (A) to (H) of this rule. A copy of said report shall be filed with the Ohio department of education on or before the thirtieth of September of each year.

(A) School year. The school shall be open for instruction with pupils in attendance for not less than one hundred eighty-two days each school year according to section 3313.48 of the Revised Code.

(B) School day. The school day for pupils in grades one through twelve shall be no less than five hours exclusive of the noon recess according to section 3313.48 of the Revised Code.

(C) Pupil attendance. Pupil attendance shall be reported to facilitate administration of laws relating to compulsory education and the employment of minors. Parents shall be responsible for reporting their child's school enrollment or withdrawal. An individual in charge of the non-chartered, non-tax supported school may, as a matter of convenience, provide the report for the parent.

(1) The attendance report shall include the name, age, and place of residence of each pupil below eighteen years of age.

(2) The report shall be made to the treasurer of the board of education of the city, exempted village, or local school district in which the pupil resides.

(3) The report shall be made within the first two weeks of the beginning of each school year. In the case of pupil withdrawal or entrance during the school year, notice shall be given to the treasurer of the appropriate board(s) of education. Such notice shall be given within the first week of the next school month.

(D) Teacher and administrator qualifications. Teachers and administrators shall have received a bachelor's degree or the equivalent thereof from a recognized college or university.

(E) Courses of study. Each non-chartered, non-tax supported school shall have courses of study for the following subjects:

(1) Language arts;

(2) Geography, the history of the United States and Ohio, and national, state, and local government;

(3) Mathematics;

(4) Science;

(5) Health;

(6) Physical education;

(7) The fine arts, including music;

(8) First aid, safety, and fire prevention;

(9) Other subjects as prescribed by the non-chartered, non-tax supported school.

(F) Pupil promotion. Each non-chartered, non-tax supported school shall follow regular procedures for promotion from grade to grade of pupils who have met the school's educational requirements.

(G) Pupil health and safety. Each non-chartered, non-tax supported school shall comply with state and local health, fire, and safety laws.

(H) Pupils attending a non-chartered, non-tax supported school are not entitled to pupil transportation as provided pursuant to section 3327.01 of the Revised Code, and pupils attending a non-chartered, non-tax supported school are not entitled to auxiliary services as provided pursuant to section 3317.06 of the Revised Code.

A non-chartered, non-tax supported school is not entitled to nonpublic administrative cost reimbursement provided pursuant to section 3317.063 of the Revised Code.

Effective: September 1, 1983

APPELLEE'S

BRIEF

SUPREME COURT, U.S.
FILED
FEB 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-488

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal from The United States
Court of Appeals for the Sixth Circuit

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Does the assertion of jurisdiction by the Ohio Civil Rights Commission over Dayton Christian Schools herein, pursuant to the Ohio Civil Rights Act which allows no religious exemptions, violate rights of appellees under the Free Exercise Clause, where the State's action is based upon a charge of sex discrimination by a teacher in the Schools who had been employed to carry out its religious mission to children and who had been dismissed solely for violation of tenets of religious faith which she had agreed to observe?

2. Does application of the Act to Dayton Christian Schools herein violate the Establishment Clause by calling for active involvement of government in religious activity?

3. Is Section 4112.02 of the Ohio Civil Rights Act unconstitutionally overbroad?

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No. 85-486

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal from The United States
Court of Appeals for the Sixth Circuit

BRIEF FOR APPELLEES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."

U.S. Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; . . ."

Ohio Civil Rights Act, Ohio Revised Code:

> Section 4112.01, *et seq.* (Reprinted in Appendix to Jurisdictional Statement, A. 132, *et seq.*).

COUNTERSTATEMENT OF THE CASE

Statement Of The Facts

Religious Nature Of Dayton Christian Schools, Inc. Dayton Christian Schools, Inc. (DCS) was created by two sponsoring churches (J.A. 31[a], is "an extension of the local evangelical fundamental church's Christian education program" (J.A. 32), and is an inter-denominational ministry of "people of Christian persuasion and members of the Body of Jesus Christ, bound by the Word of God. . . ." (J.A. 3). DCS' governance is by a Board of Directors whose members must subscribe annually to a Statement of Faith (J.A. 3) and who serve as "spiritual leaders of the Corporation, waiting upon God for His direction and wisdom." (J.A. 11). The DCS Constitution's statements of faith and of purpose cannot be amended without approval of the founding churches. (J.A. 16; Tr. 34). Because of its Scriptural belief in church-state separation, DCS refuses to participate in any form of government aid, direct or indirect. (J.A. 110; Tr. 37).

Scripture is the single and unifying foundation of DCS. (J.A. 5-6). Since Scripture is inerrant, adherence to Scripture must be total, not partial. (J.A. 3, 32; Tr. 32).

The Schools' goal is to provide a "Christ-centered education", "based upon the Word of God". (J.A. 17). DCS exists as a "ministry" (*ibid.*), whose "entire process" is "a means used by the Holy Spirit to bring the student into fellowship with God." (J.A. 31). Therefore, while "regular courses of study" required by state law are offered (J.A. 7), "all" subjects must be taught in a manner "to create in each student an awareness of God's supreme authority" (*ibid.*), "all studies and activities" are to be "God-centered and related to the spiritual" (J.A. 33) and religion is to be integrated into all instruction. (J.A. 35-36). Hence, while state standards imposed upon public schools are met, "the major distinction" of DCS from public schools is "the

[a] Signals are used herein as follows: "J.A." (Joint Appendix), "Tr." (Transcript of Proceedings in the District Court), "A." (Appendix to the Jurisdictional Statement), "P." (exhibits of District Court plaintiffs, the appellees here), "Br." (Brief For Appellants), "R." (Docket number in the District Court).

fact that [in DCS] all truth is related and interpreted from God's viewpoint." (J.A. 17). In DCS there is no "differentiation between secular and sacred." (Tr. 32).[1]

Religious Role Of The DCS Teacher. The teacher at DCS is considered to be a "missionary" whose function is "to help mold and shape pliable young lives for the honor and glory of our Savior and Lord, Jesus Christ." (J.A. 28). Hence a candidate for the teaching ministry at DCS, is informed, prior to hiring, of the nature of DCS. (J.A. 17). Detailed religious requirements are imposed upon the DCS teacher both in teaching and in personal life. (J.A. 27-35). The teachers' relationship with Jesus Christ and their lifestyle is "crucial" to their employment at DCS (Tr. 40), and the commitment of the teachers to DCS' religious educational philosophy is made part of the teacher's contract, the teacher being required to initial express acceptance of each paragraph of the Statement of Faith and educational philosophy. (J.A. 59-61; Tr. 41). To be employed, the teacher must agree to abide by each of the rules contained in the Teacher's Manual. (Tr. 50; J.A. 27-35).

The teaching function is to impart religion by the inculcating of Scriptural truth in all that is taught and by personal example relating all of that to the child's life (Tr. 31), with more learning taking place through the lifestyle of the teacher than through the curriculum itself. (Tr. 48).

An important feature of the teacher contract is a provision which calls for the internal peaceful resolution of differences: the teacher agrees to follow "the Biblical pattern of Matthew 18:15-17 and Galatians 6:1[2] and always give a good report. All

1. The District Court found that the purpose and mission of DCS "is for propagation of the Christian beliefs and faith and that this religious orientation is an integral part of the school's philosophy and operation. The aforesaid religious purposes are shown by the evidence to permeate the school's goals, curriculum and administration." (A. 38). The Ohio Civil Rights Commission did not, in the Court of Appeals, cross-appeal the District Court's findings of fact.

2. Matthew 18:15-17:

> "Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast

differences are to be resolved by utilizing Biblical principles — always presenting a united front." (J.A. 61, 69). While this is seen by DCS as affording a practical grievance procedure ("Scriptural chain of command") for the airing of disagreements (Tr. 33)[3], it is more particularly a binding Scriptural requirement which must be followed. (J.A. 23, 26, 46, 47; Tr. 72).

Religious Interests Of DCS Parents And Teachers. Parent plaintiffs, out of religious conviction, chose DCS as the school for their children (Tr. 97, 103, 104), expecting DCS to be faithful to doctrine (Tr. 100) and the teacher to provide a Scriptural example to the students. (Tr. 104). Teachers at DCS regard their role there as a religious vocation in the Christian formation of young people. (Tr. 114, 118). Essential to the school, in their view, is the complete faithfulness of the teacher to Scripture. (Tr. 113-114).

DCS' Relationship With Linda V. Hoskinson. Mrs. Hoskinson became employed by DCS in 1974 as a teacher of elementary school children. In 1977, following an evaluation of her teaching by the elementary school principal who expressed concern over her imposing "mass discipline" on students, "spending undue amounts of time disciplining", and her "resistance to contacts with parents during off school hours" (P. 26), Mrs. Hoskinson wrote a lengthy letter directly to the DCS Board of Directors. (P. 27). This was in violation of the Scriptural "chain

NOTES (*Continued*)

gained thy brother.

"But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established.

"And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as a heathen man and a publican."

Galatians 6:1:

"Brethren, if a man be overtaken in a fault, ye which are spiritual, restore such a one in the spirit of meekness; considering thyself, lest thou also be tempted."

3. As the District Court stated: "In summary, the concept of Chain of Command is closely intertwined with the concept of giving a good report, both of which are scripturally based explanations of an authority structure and, procedurally speaking, are somewhat akin to the legal concept of exhausting administrative remedies." (A. 60).

of command" policy (since she had not approached, first, the Principal, then the Superintendent respecting the problem). (Tr. 72). After the Board had found her to have violated the policy (J.A. 36), the Superintendent responded to her letter (J.A. 37-38). Her employment, following this first violation of the policy, was permitted to continue. (Tr. 73).

On April 17, 1978, Mrs. Hoskinson entered a new one year contract with DCS, which again provided for her adherence, *inter alia*, to the above Biblical policy for resolving differences. (J.A. 59-61). On November 20, 1978, she signed a Good Report Form pledging observance of the same policy. (J.A. 69). In December, 1978, DCS circulated a new contract form (P. 20) which further emphasized its policy concerning internal resolution of disputes. (Tr. 142).[4]

In January, 1979, Mrs. Hoskinson notified DCS that she was pregnant. DCS, by letter dated February 20, 1979, informed her that she would not receive a teaching contract for the coming year due to DCS' Biblical view relating to "the importance of the mother being in the home during the early years of child growth." (J.A. 70). Solely because DCS felt that this view had not been adequately explained to its faculty, and not because of any change in its principle on the point,[5] DCS later rescinded this letter. (Tr. 140).

Following receipt of the February 20, 1979, letter, Mrs. Hoskinson consulted an attorney respecting the legality of DCS' declining to offer her a new teaching contract. (Tr. 124). On March 6, 1979, the attorney wrote DCS on her behalf charging

4. "10. Because the work wherein we are engaged is an area involving the religious tenets of belief, and is composed of spiritual activities over an educational function, and that it is a sacred undertaking, we cannot authorize anything other than an arbitration before the believers for any kind of dispute that may exist. Arbitration in this manner is the only Biblical means which is acceptable for discipline purposes. Parties signing this contract waive all rights to take their cause before a court of law. I Corinthians 6:1-8 is very clear on this point, and as believers, we are to obey these instructions." (P. 20).

5. ". . . [T]he record supports the conclusion that, at least in the mind of Mr. Schindler [the DCS Superintendent], the nonrenewal of Mrs. Hoskinson's teaching contract was an act consistent with and compelled by religious beliefs." (A. 61; see also A. 101).

that DCS' decision to not offer her a new contract was illegally discriminatory and threatening litigation. (J.A. 71-72). On March 14, 1979, the Superintendent of DCS invited Mrs. Hoskinson to discuss the matter and urged her to seek to resolve the matter as required by the Scriptural policy. Mrs. Hoskinson, on advice of her attorney, declined discussion.[6] Thereupon, the Superintendent informed her that she was suspended. (Tr. 124-126).

The DCS Board reviewed the suspension on March 14, 1979, and on the following day invited Mrs. Hoskinson to a special hearing to discuss the suspension. Although Mrs. Hoskinson stated at trial[7] that she had already made prior arrangements with a baby-sitter to care for her child should she continue teaching (Tr. 123, 135), at that hearing, based upon her attorney's advice, she did not disclose those arrangements to the Board or discuss her economic need to work. (Tr. 135). Following that hearing, the Board, on March 26, 1979, concluded that there was a "serious philosophical difference" between Mrs. Hoskinson and DCS evidenced by her violation of Paragraph 13 of her contract (relating to the Scriptural "Good Report" policy).[8] Hence it adopted a resolution terminating her services. (J.A. 73). By letter dated March 27, 1979, DCS notified her of this termination. (J.A. 74).[9]

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6. The District Court noted: "Linda Hoskinson's own testimony acknowledged her awareness of the Biblical Chain of Command . . . and that a passage in the Bible admonishes one Christian not to take another Christian to law." (A. 63).

7. ". . . the immediate ostensible precipitating cause of Mrs. Hoskinson's discharge was the fact that she went to an attorney to obtain advice and assistance in resisting the decision not to renew her contract because she was pregnant." (A. 65; see also A. 101-102).

8. The Court of Appeals, noting that OCRC did not challenge the District Court's findings of fact, stated:

> "Therefore, we do not consider whether the district court erred in concluding that the religious beliefs were sincerely held or that DCS discharged Hoskinson because of those sincerely held beliefs."

(A. 8 n. 4).

The Course of Proceedings

The day following her termination Mrs. Hoskinson filed with the Ohio Civil Rights Commission (hereinafter "OCRC" or "Commission") a charge of discrimination by DCS on account of sex, alleging three grounds: (a) that DCS had stated in writing that a mother's place is at home with her child; (b) that she had been suspended because of consulting outside help; and (c) that she had been terminated because of serious philosophical differences with DCS. (J.A. 76-77). Based upon this charge, the Commission's Regional Office, encouraging "adjustment" by DCS "in lieu of a potentially costly and time consuming investigation", recommended formal investigation. (J.A. 80). Thereafter, OCRC requested extensive information, documentation and personal interviews from DCS[9] and suggested that DCS might wish to make a settlement offer. (J.A. 81-83). DCS

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9. "(1) EEOCOCRC-33 employment data on Respondent for 1977 to the present. A blank OCRC-33 is enclosed for your convenience. (2) Blank employment application forms currently used by Respondent. (3) Employee handbooks and rules and regulations for the period January 1, 1977 to the present. (4) Written Respondent policy on the specific factors and procedures involved in the following for the period January 1, 1977 to the present: disciplinary actions, up to and including discharge; employee pregnancies; oral and written performance evaluations; performance standards; employees working with pre-school children; contract renewal; employee grievance procedures; employees resorting to the legal system in grievances with Respondent; determination of 'serious philosophical differences'; inquiries into employees' financial status and baby-sitting plans. (5) Complete job descriptions and model contracts for the teaching position held by Complainant, from January 1, 1977 to the present. (6) A list of all Respondent employees who were pregnant during the period January 1, 1977 to the present, including: name; date of hire; dates of pregnancy; any change in status of employee while pregnant or afterward, including persons recommending change; name; sex; title; reason for change. (7) A list of all employees suspended and/or discharged from January 1, 1977 to the present, including: name; sex; date of hire; position(s) held, with dates; date of suspension/discharge; reason for suspension/discharge; person recommending suspension/discharge (name, sex, title). (8) A written position statement regarding each of Complainant's allegations. (9) Minutes of Respondent's Board of Directors meetings for March 13 and 26, 1979. (10) Complete personnel files for Complainant [and other specified individuals]." (J.A. 81-82).

then informed OCRC that DCS was not subject to OCRC jurisdiction in this matter. (J.A. 88). On January 28, 1980, OCRC made a determination that it was probable that DCS had engaged in discriminatory practices unlawful under Chapter 4112 of the Ohio Revised Code (hereinafter "Act") due solely to the fact that Mrs. Hoskinson "is female and selected [sic] to have a child." (J.A. 87-91). Appended to the Determination was a proposed Conciliation Agreement and Consent Order, under the provisions of which, DCS would agree, *inter alia*, (1) that OCRC "has full and complete jurisdiction of the parties", (2) to immediately reinstate Mrs. Hoskinson, (3) to administer Dayton Christian Schools without regard to the employees' religion or sex, (4) to seek no information about an employee's religion or sex "unless a bona fide occupational qualification is certified in advance by the Commission", (5) to establish guidelines for employee pregnancy and home care, and (6) to allow OCRC to conduct on-premises compliance reviews over the next three years. (J.A. 94-98). OCRC followed this with a complaint on April 18, 1980. (J.A. 100).

DCS filed an answer to the administrative complaint stating that it is a religious institution established solely to "train children in the nurture and admonition of the Lord" and that OCRC might not assert its intended jurisdiction over such an institution in this matter. (J.A. 103).

On October 1, 1980, the two sponsoring churches, DCS, its Superintendent, two parents of DCS children, and a DCS teacher filed this 1983 action in the United States District Court seeking (a) a declaratory judgment that enforcement of the Ohio Civil Rights Act in the premises would be violative of the Free Exercise and Establishment Clauses and (b) an injunction on grounds of immediate and irreparable harm. (J.A. 106-122). An evidentiary hearing ensued on December 8, 1980, the District Court, in its Final Pretrial Order filed December 1, 1980, having stated that "[t]he jurisdiction of the Court is not disputed." (J.A. 127).

On January 6, 1984, more than three years after the plaintiffs (DCS, *et al.*) had presented final argument before it, the

District Court entered its opinion and judgment denying plaintiffs the permanent injunction they had sought. (A. 53-120). Thereafter, the District Court, stating that the plaintiffs would otherwise "suffer irreparable harm" due to permanent loss of their First Amendment Rights interim, issued an injunction pending appeal. *Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission*, 604 F.Supp. 101 (S.D. Ohio 1984). The plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit. That court reversed, the panel unanimously holding that the application of Ohio Code 4112.01, *et seq.* to DCS in these circumstances was violative of the Free Exercise and Establishment Clauses of the First Amendment. (A. 1-30). OCRC appealed to the Supreme Court which, on November 12, 1985, granted review, ordering that further consideration of the question of jurisdiction be postponed to the hearing of the case on the merits.

SUMMARY OF ARGUMENT

The Court has jurisdiction over this appeal since the appeal meets the requirements of all relevant jurisdictional statutes and presents no issues relating to federal court abstention under the teachings of this Court.

This case centers upon the freedom of religious associations to adhere to their declared doctrines in those employment relationships which lie at the heart of their religious ministry. The Court's decisions protecting religious exercise and its related decisions protecting the right of churches to self-governance stand as a complete bar to the State's effort in this case to force Dayton Christian Schools to abandon doctrinally founded religious practice and to become party to violation of its own basic teachings.

Application of the Ohio Civil Rights Act herein would severely burden Dayton Christian Schools' religious exercise. The Act, unlike anti-discrimination acts of most states and Title VII of the federal Civil Rights Act, contains no religious exemption whatever. The Ohio Civil Rights Commission was thus not free to consider any religious defense which could be raised by Dayton Christian as justification for its employment decisions.

Yet the Schools' policies relating to the role of the mother of young children and to "Good Report" are religiously based. The State is totally incorrect when it insists that the Free Exercise Clause protects religious exercise solely where no inequality results from that exercise. By insisting that Dayton Christian hire a teacher who rejects its essential doctrine, the State threatens to destroy the religious integrity of a religious organism.

Dayton Christian's special purpose is the formation of children, religiously and morally, through a "Christ-centered education" " based upon the Word of God". That formation depends critically upon the instruction given and the example set by its teachers, all of whom expressly agree to abide by the religious tenets of the Schools as part of their contractual obligation. The State, in seeking to force Dayton Christian to accept a teacher who has rejected any such tenet, would require that the Schools' children and their parents be shown a graphic example of unfaithfulness to religion, of breach of a contract, and of a governmental exercise of power within the Schools to prevent observance of religious precepts. So, too, would the State's action be destructive of the religious vocations assumed by the other teachers at Dayton Christian, since the State would be actively supporting dissidence in a faculty whose whole labor is to support doctrinal fidelity.

No compelling state interest justifies such injury to religious liberty, and the State offered no such proof upon the trial. Dayton Christian Schools does not contest the conclusion of the Court of Appeals that anti-discrimination statutes may be applied to religious institutions where religious belief is not implicated, and thus no effect of injuring societal goals in countering sex discrimination is threatened through protecting the Schools in this case. To the contrary, a ruling in favor of the State would mean that no church or religious association — evangelical Protestant, Roman Catholic, Mennonite, Jewish, or other — which has a doctrinally dictated practice of sexual differentiation — could further enjoy its historic freedom to observe such practice.

Application of the Act herein requires "active involvement of the sovereign in religious activity", and, hence, is violative of

the Establishment Clause. The District Court was correct in recognizing an extremely high potential for entanglements here, and the Court of Appeals was correct in showing these to be actual and excessive.

When government seeks to regulate First Amendment activity, it may do so only with narrow specificity. Having failed to meet that standard, Ohio's statute is unconstitutionally overbroad as applied to religious institutions.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THIS APPEAL

While the Court on November 12, 1985, entered an order postponing consideration of the question of its jurisdiction, appellees believe that the Court's jurisdiction over this appeal is clear.

First, the appeal meets the requirements of 28 U.S.C. §1254(2), in that the State (appellants) has relied from the beginning upon a state statute and because that statute has been held invalid as sought to be applied by the State to appellee Dayton Christian Schools. *Second*, there can be no doubt that the District Court had subject matter jurisdiction under 28 U.S.C. §1331, 1343, 2201, 2202 and 42 U.S.C. §1983. *Third*, abstention by the District Court was not required under the doctrine of *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941), there being present here no question whatever of interpretation or construction of an ambiguous or uncertain statute. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). *Fourth*, district court abstention should not now be required under *Younger v. Harris*, 401 U.S. 37 (1971). The State on October 28, 1980, filed a Memorandum In Support of Motion to Dismiss and Dissolve Temporary Restraining Order (R.9) arguing that the District Court had discretion to exercise jurisdiction but that it should abstain. Thereafter, the State voluntarily chose to submit to the federal forum, the District Court's Final Pretrial Order December 1, 1980, reciting: "The jurisdiction of the Court is not disputed." (J.A. 127). The State did not again mention jurisdiction in the District Court, before the Court of Appeals, or

in its Jurisdictional Statement. In its response to this Court's direct invitation to discuss jurisdiction, the State insists that the Court has jurisdiction. It is thus apparent that the State "now has concluded to submit the constitutional issue to this Court for immediate resolution." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 (1977); *Brown v. Hotel and Restaurant Employees and Bartenders Union*, 468 U.S. ___, 104 S.Ct. 3179, 82 L.Ed.2d 373, 382 n. 9 (1984).

This litigation was commenced more than five years ago, on October 2, 1980; a full hearing on the merits was held December 1, 1980, and not until three and a half years later, June 1, 1984, was a decision forthcoming from the District Court. The declining of jurisdiction on abstention grounds now would impose great and needless burdens on all litigants.

II. IMPOSITION OF THE CHALLENGED PROVISIONS OF THE ACT UPON DAYTON CHRISTIAN SCHOOLS VIOLATES RIGHTS OF APPELLEES PROTECTED BY THE FREE EXERCISE CLAUSE

At the heart of this case lies the right of a religion to define itself. At jeopardy in this case are the rights of a religious teaching institution to exercise, without governmental interference, its core function of imparting its faith in its full integrity and to select those individuals to whom will be entrusted the responsibility of conveying that faith to a new generation. The constitutional principles stated by this Court in the cases it has decided on liberty of conscience and on rights of religious associations to self-governance control the disposition of this appeal.

In *Sherbert v. Verner*, 374 U.S. 398, 403-406 (1963), this Court set forth the inquiry required to be pursued in order to test claims of free exercise violation. Applied here, that inquiry calls for (1) proof by the claimant that religious exercise is truly involved; (2) proof by the claimant that government has actually burdened that exercise; and (3) proof by government that the burden is justified by a sufficiently compelling societal interest (as contrasted with a merely important public interest), and that that interest cannot be achieved except through the suppression

of the religious practice involved. Free exercise decisions of the Court subsequent to *Sherbert* have not departed from these requirements. *See United States v. Lee*, 455 U.S. 252, 257-259 (1982); *Thomas v. Review Board*, 450 U.S. 707, 716-718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 214-215 (1972). Paralleling these are the Court's decisions upholding the freedom of religious bodies from governmental determinations of their discipline or polity. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

A. *The Operation Of Dayton Christian Schools Is A Protectable Religious Exercise*

Such was the conclusion of the District Court, whose findings were unchallenged by the State and confirmed by the Court of Appeals. The State, at the Supreme Court level, seeks now to overset those findings. The State argues that "DCS . . . is not a church, a seminary or a Sunday school", that its activities "although pervasively religious, fall on a different tier than religious worship or purely religious instruction." Br. 17. According to the State, DCS is a "full-scale elementary and secondary school engaged in the endeavor of providing, as a state-chartered alternative to the public schools, secular education as well as religious instruction. DCS, therefore, falls at the intersection between purely religious and purely secular activity. . . ." (*ibid.*) and "has entered a field of particular state concern and traditionally subject to extensive regulation." *Id.* at 19. The State points to DCS' Constitution which recites DCS' "intent" to act in compliance with Ohio regulations. *Ibid.* n. 4.[10] Thus DCS is *simply* a "school" and an "employer". Br. 19. The State's argument ignores the record herein, contradicts the conclusions of both the District Court and the Court of Appeals and flies in the face of decisions of the Supreme Court.

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10. That DCS is "chartered" (Br. 3, 38) in no way detracts from its totally religious character. In any event, Ohio's chartering regulations cited by the State (Ohio Admin. Code §3301-35-07), allow a religious school to discriminate on the basis of religion.

As to the record herein, and the determinations of both courts below, appellees can but respectfully refer the Court to the facts appearing in Counterstatement of the Case, *ante*, and the conclusions therein quoted from the District Court and Court of Appeals opinions. As to decisions of the Supreme Court, it is impossible to compare the record herein with the opinions in *Lemon* v. *Kurtzman* , 403 U.S. 602, 616-619 (1971), *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 767 (1973), *Meek* v. *Pittenger*, 421 U.S. 349, 365, 366 (1975) and *Aguilar* v. *Felton*, 473 U.S. ____, 105 S.Ct. 3232, 87 L.Ed.2d. 290, 291-292 (1985) without concluding that the Christian schools in the present case are constitutionally indistinguishable from the Catholic, Lutheran, Christian Reformed and other religious schools of "predominant sectarian character" (*Meek*, 421 U.S. at 364) variously involved in those cases. Those religious schools were *not* simply "schools" but were religious organisms whose " 'raison d'etre . . . is the propagation of a religious faith.' " *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). Instruction therein is not divided into secular and religious components (Tr. 32), since, within these schools, "the two are inextricably intertwined." *Meek*, 421 U.S. at 366. The statutes involved in *Lemon* presented the very bifurcation which the State here ascribes to DCS. They were a legislative attempt to isolate (for purposes of state aid) "secular educational services" from the pervasively religious educational organisms in question. The Court voided those statutes not because they provided government aid to private schools but because the private schools in question were — like DCS — absolutely religious. Further, all the schools in the foregoing cases were subject to state laws similar to those relating to DCS.

In *NLRB* v. *Catholic Bishop of Chicago*, NLRB posed an argument similar to that made by the State here: that the Catholic schools there involved, while "religiously associated", were not "completely religious" (440 U.S. at 499), because the schools were performing in part "the secular function of educating children" (*Catholic Bishop of Chicago* v. *NLRB*, 559 F.2d 1112, 1119 (7th Cir. 1977)), and "the instruction was not limited to religious subjects." *Id*. at 1116. The Supreme Court noted that,

because of the nature of the schools, exercise of jurisdiction by the Labor Board would "give rise to serious constitutional questions." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. at 501.

This Court has several times stressed the particular significance of the employment relationship within schools dedicated to the propagation of a faith. In *Catholic Bishop*, the Court pointed to its recognition of "the critical and unique role of the teacher in fulfilling the mission of a church-operated school", where " '[r]eligious authority necessarily pervades the school system' " (440 U.S. at 501), and noted that "the church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school." *Id*. at 504.[11] In *Catholic Bishop*, the Court but echoed conclusions which it had previously stated in *Lemon*, 403 U.S. at 618 and *Meek*, 421 U.S. at 369-372. In the present case the trial court found the relationship of teachers to the religious mission of DCS was of central importance (A. 73-76), the decision of DCS to terminate Mrs. Hoskinson's employment was "founded on religious precepts" (A. 101), and was "a means for Plaintiffs to carry out, or put into practice, their religious beliefs." (*Ibid*.). Plainly both courts below were correct in holding that DCS' activity and, in particular, its relationship to its teachers, is an "exercise of religion."

The State, in its brief, "does not question the freedom of religious institutions to act in matters of purely ecclesiastical concern." Br. 17. Nor does it contend that such religious "institutions' "employment decisions" should be "subject to state regulation with respect to persons selected to offer exclusively religious instruction." (*Ibid*.). Despite the lack of any statutory exemption of such employees, the State apparently thus recognizes the unconstitutionality of restricting the necessary latitude

11. The DCS teacher, as religious witness, instructor and exemplar, carries out the core function of the religious institution. Thus, the employment relationship found in the present case is not remotely like that found in the commercial enterprise which sought protection under the cover of religion in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, ____ U.S. ____, 105 S.Ct. 1953, 85 L.Ed.2d 278, 286 n. 18 (1985).

required by religious institutions in dealing with those who impart the tenets of faith. In light of the religious functions carried out by every teacher at DCS — conducting devotionals, providing direct instruction in Bible study (P. 7, P. 32), integrating Biblical precepts into every subject taught (J.A. 35-36), and giving witness to religious truth by example and conduct — there is no principled basis on which to exclude DCS teachers from the scope of the admission which the State has made regarding its lack of power to regulate (apparently *all*) "employment decisions" respecting those persons who actually provide religious instruction. Moreover, DCS has never contended in this case that every employment decision respecting its teachers is free from all legal constraints. What is here sought by DCS is protection from State intrusion into religiously necessitated decisions.

B. Application Of The Act To Dayton Christian Schools, In The Circumstances Of This Case, Would Severely Burden Appellees' Religious Exercise

The State's brief omits any discussion of the record evidence that application of the Act to DCS would severely burden appellees' religious exercise. The State instead initially tackles the issue of burden by discussing the first and third prongs of the *Sherbert* inquiry: the burden is permissible, so the State argues, "because of the nature of the institution involved and the overwhelming importance of the State's objective in seeking to eradicate discriminatory conduct based on immutable characteristics such as sex or race." Br. 17. This discussion is not germane to the essential second prong of that test, namely, the issue of the actuality of, and degree of, burden upon religious exercise.

Next, the State argues that since no unconstitutional burden on parents was found in *Runyon v. McCrary*, 427 U.S. 160 (1976), none may be found here. While *Runyon's* facts are remote from the facts of the present case, its inapplicability here is settled by the Court's own careful statement therein that the Free Exercise Clause of the First Amendment was "in no way involved". *Id.* at 167 n. 6.

Finally, the State argues that since the burden upon free exercise in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), threatened the destruction of a sect, the allegedly lesser burden to DCS in the present case is permissible. Br. 20. But the Court has held many sorts of burdens on free exercise impermissible which did not threaten the destruction of a sect. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Thomas v. Review Board*, 450 U.S. 707 (1981). To adopt the State's extreme view would mean that any burden on religious exercise falling short of actual destruction of a sect is constitutionally sanctioned. Further, while *Yoder* involved no effort on the part of the state to identify a doctrinally based religious practice and to forbid its observance, the opposite is the case here. The burden here imposed would be at least as severe as that seen in *Yoder*, since it strikes at the core of the religious body, namely, its doctrinal integrity. The Court of Appeals was plainly correct in its conclusion that application of the Act herein would indeed severely burden the religious liberty of appellees:

1. The Commission, By The Terms Of The Act, Was Not Free To Recognize Any Religious Defense Raised By Dayton Christian Schools As Justification For Its Employment Decisions

In response to the charge filed against it, DCS responded that its policy respecting the role of the mother and the "Good Report" policy were dictated by DCS' religious doctrine. (J.A. 88-89). The Ohio Civil Rights Act contains no provision which would allow the Commission to consider that fact.[12] Indeed the statute effectively precludes Commission review of *any* religious defense except with respect to a bona fide occupational qualification certified in advance by the Commission under Section 4112.02(E), or a housing preference under Section 4112.02(K). The bona fide occupational qualification exemption would be inapplicable here since none of its six categories cover the actions charged against DCS and, in any event, to "get advance approval

12. As the Court of Appeals noted, the statute in this respect stands in sharp contrast with Title VII of the federal Civil Rights Act and with the statutes of most states. (A. 16-17).

from the Commission that religion was a "bona fide occupational qualification" (A. 79) would appear to be an unconstitutional prior restraint on religious exercise. The Commission would thus have been obligated to exclude as irrelevant any evidence supplied by DCS in support of the religious exemption which it sought. Further, the Commission is not empowered to consider constitutional issues. *Mobil Oil Corp. v. Rocky River*, 309 N.E.2d 900, 902, 38 Ohio St.2d 23 (1974). Although the Act authorizes appeal to the Court of Common Pleas, DCS could not, under the terms of Section 4112.06, have obtained *de novo* review. (A. 16). And since the Commission would have had to exclude evidence of religious justification herein as irrelevant, such evidence could not be considered by the Court of Common Pleas.[13]

The effect of this preclusion of religious claimants from presenting religious justification made inevitable the Commission's actions following the filing of the discrimination charge — *i.e.*, its launching of an investigation, its determination of "probable" unlawful discrimination, its proposal to DCS to enter into a detailed Conciliation Agreement and Consent Order by which DCS would cease to follow the very practices which DCS had insisted it was religiously required to follow, and the bringing of the Commission's complaint. The necessary effect of DCS' being thrust into a Commission hearing was to subject it not merely to that momentary reach of the Act[14], but to the full and continuing

13. While in any event DCS was not obligated to have sought exhaustion of administrative remedies (*Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)), to have sought them here would only have been futile. *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 330 (1969).

14. The Supreme Court, in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), found actual, direct and immediate harm to be present in the attaching of NLRB jurisdiction to the religious schools there considered, by means of investigation following the making of charges (and apart from broader questions relating to terms and conditions of employment):

> "The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the schools' religious mission. *It is not only the conclusions that may be reached by the Board which impinge on rights guaranteed by the Religion*

scope of Commission jurisdiction. The very point of DCS' bringing its action in federal court was the State's insistence that, irrespective of any religious basis which DCS had for its policies, the State must proceed to enforce the Act. The District Court correctly noted that the powers vested in the Commission by Section 4112.04 accentuated the potential for governmental intrusion into the administration and operation of DCS. (A. 83). The proposed Consent Order was rightly taken by DCS as a direct threat, with heavy impact upon its teacher selection process. The prestige and power of government were brought to bear upon a religious institution and its employees, with notice that the State would step in to protect religious dissidence.

2. Application Of The Act Herein Would Impair A Religious Body's Right Of Self-Governance

The law is clear that religious bodies (including churches) have the right to self-governance and that the civil authority may not intrude upon that right.[15] More than a century ago, in language which it has often repeated, the Supreme Court said:

> *Clauses, but the very process of inquiry leading to findings and conclusions.*"

Id. at 502. (Emphasis added). *And see Surinach v. Pesquera des Busquets*, 604 F.2d 73, 75-76 (1st Cir. 1979).

15. Perhaps the plainest statement is found in Jefferson's 1808 letter to Reverend Samuel Miller:

> "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercise. . . . Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline has been delegated to the General Government. . . . Every religious society has a right to determine for itself the time for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it."

11 THE WRITINGS OF THOMAS JEFFERSON, 428-429 (A. Lipscomb ed.1904). Madison also said during the debates on ratification of the Constitution that "[t]here is not a shadow of right in general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation." 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON ADOPTION OF THE FEDERAL CONSTITUTION, 330 (1836).

> "The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members . . . within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. *It is of the essence of these religious unions*, and of their right to establish tribunals for the decision of questions arising among themselves that those decisions should be binding in all cases of ecclesiastical cognizance, *subject only to such appeals as the organism itself provides for*."

Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-729 (1872). (Emphasis added). It is a matter of common observation that, in all religious associations, conflicts and tensions arise and claims are made that those in recognized authority have acted unfairly. But

> ". . . it is of the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance."

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 715 (1976). *And see, Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

While, in *Serbian* (and other cases) the Court has held the self-governance of religious associations to be protected by the Religion Clauses of the First Amendment, the view of even the

dissenting justices in *Serbian* would likewise sustain the self-governance principle on the basis of contract. Justices Rehnquist and Stevens, in *Serbian*, quoted from *Gonzalez v. Archbishop*, 280 U.S. 1, 16-17 (1929) as follows:

> " 'In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, *because the parties in interest made them so by contract or otherwise* . . ."

Serbian, 426 U.S. at 729-730. (Emphasis in the original).

3. Application Of The Act Herein Would Destroy The Religious Integrity Of A Religious Ministry

The District Court found that Mrs. Hoskinson entered into an employment contract with DCS with complete knowledge of, and express consent to, the "Good Report" principle. Further, it is established that, irrespective of her knowledge of, or consent to, the concept of providing maternal care and nurture at home with her child, that concept was a religious principle held by DCS. The record is clear that these doctrines are held to be *Scriptural* by DCS. It would not be proper for the civil courts to act as "arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. Nothing is more central to DCS' faith than its belief in the inerrancy and authority of the Bible. All in the DCS faith community — the Board, school officials, faculty and parents — must observe the "Good Report" policy because of that fact. For the Commission to penalize DCS' exercising the "Good Report" precept is to penalize the reliance, by DCS, on the Bible as the centerpiece and ultimate reference point for its faith and practices.

The State, however, argues for State power to pass upon whether DCS may enforce, within its schools, discipline protective of the observance of those doctrines and, indeed, the contractual obligation pertaining to "Good Report". Further, the State contends that DCS may *not* require observance of these doctrines (through refusal to renew contracts of those who flout

them or through discharging such persons). The State, nevertheless, makes this disclaimer:

> "[T]he Act restricts DCS' activities only to the extent to which it, as an employer, seeks to impose its beliefs on its employees, and even then only to the extent its beliefs are unequally applied on the basis of sex, race, or other classification protected under the Act. This case does not question a religious school's right to have members of its own faith as teachers."

Br. 20-21. In other words, the State may directly bar any religious body (including a church) from requiring its employees to adhere to its faith commitment where, *in the judgment of the State*, the beliefs are "unequally applied" on the basis *even of religion* ("other classification protected by the Act") — the very case here. The record shows that, far from there having been any attempt by DCS to "impose" its beliefs, Mrs. Hoskinson obtained years of employment at DCS by representing that she embraced its beliefs, and that she entered into that employment freely. What the State now seeks is, in effect, to impose *her* beliefs on DCS — which is asked to recant[16] doctrine.

The above quotation, however, gives the State's case away: a religion's *beliefs* are what make it a religion; and religions are self-defining. The State says that DCS is free to "hire members of its own faith as teachers."[17] Therefore, the State admits that

16. "Recant" is the appropriate term, since, by giving up a religiously founded practice in obedience to the State's demand, DCS would give up the expression of a doctrine. As the Court has noted, the Free Exercise Clause speaks not of beliefs but of their exercise. *Yoder*, 406 U.S. at 219-220.

Moreover, OCRC now seeks to impose upon DCS precisely that result which this religious institution had sought to avoid when it initially determined it ought not renew the contract of a new mother: that it become the active agent in breaching Scripture by taking that mother away from her newborn child for substantial and critical periods of time.

17. The Act, as has been seen, allows no such exemption. But the State, arguing that the Ohio Act is a "counterpart" of Title VII of the federal Civil Rights Act (Br. 5), in fact attacks the constitutionality of the Ohio Act when it

DCS is free to not hire Mrs. Hoskinson, since she rejects doctrines which are part of DCS' religion. If, however, it is the State's view that government agencies can decide that she is, or is not, of DCS' faith, then the State supports the view that these agencies can rule that one who rejects the papacy is a Catholic, who rejects the Bible is a Baptist, or who affirms the divinity of Christ is an orthodox Jew. That extreme view means that anti-discrimination laws could be used to require the Roman Catholic Church to ordain women or Hasidic congregations to accept women rabbis.

The very life of a religious ministry depends upon its ability to maintain a unity and discipline among those who have freely consented to become members of the household of its faith. If a secular agency — particularly one possessed of the power and prestige of government — may exercise jurisdiction within the religious organism, in matters absolutely doctrinal, the religious liberty of that organism is destroyed.[18] As the appellees, upon

says: "The absence of an explicit statutory exemption for religious discrimination is immaterial, however, since the Constitution itself restrains the State from taking action to limit religious discrimination. . . ." Br. 27.

18. To be noted is the District Court's ready acknowledgement that *extreme* intrusion upon religion would result from Commission jurisdiction over DCS:

> "The extension of OCRC jurisdiction over DCS to conduct an investigation into a charge of sex discrimination and retaliatory employer actions, would enable the OCRC to interject itself into the dispute resolution process at DCS. Were the Commission to determine, as it did in the instant matter, that probable cause exists that DCS was or is acting in a prohibited discriminatory fashion, DCS would either have to voluntarily settle the dispute (by agreeing to a consent decree and conciliation order or by proffering an acceptable offer of its own) or face having charges filed against it and defending itself at an administrative hearing. During the investigative and hearing process, certain staff and administrators at DCS would find themselves having to respond to Commission inquiries and to relate their impressions of the events giving rise to the charges. Moreover, if an aggrieved employee sought legal assistance or if an employee participated in an OCRC investigation or hearing, DCS could not discriminate or act adversely towards that employee for so acting. Though to DCS, such action would constitute a valid ground for dismissal for what would be viewed as a violation of the Biblical Chain of Command, to the

trial, had testified, fidelity to Scripture is the keystone of the DCS ministry. (Tr. 52). The State may not constitutionally remove that keystone or even set it ajar.

A particular injury here lies in the fact that a *religious school* is involved — an institution having the special purpose of forming children, spiritually and morally, in Christ's image according to Biblical faith. As the record so clearly brings out, that formation depends — criticially — upon the *example* set by both teacher and school. As the District Court correctly stated:

> "The age and concomitant impressionability of the children attending DCS probably render them more vulnerable to the influence of their environment than might be older students attending college."

(A. 110).

As the State sees it, however, these children and their parents and faculty must be shown, within their very school, the examples of

- — a teacher in their school breaking a solemnly made promise.
- — a teacher refusing to carry out practice established by religious doctrine.
- — governmental agencies being permitted to prevent observance of religious precepts.
- — governmental agencies claiming the ultimate power to substitute their own social policy prescriptions for Biblically ordained teachings.

NOTES (*Continued*)

> OCRC, such action would constitute a violation of the prohibition against retaliatory employer conduct. All of this procedure would also require Plaintiffs to involve an outside party in the resolution of certain of their disputes despite their avowed belief in the internal resolution of differences through adherence to the Biblical Chain of Command and the proscription against giving a bad report."

(A. 104).

4. Application Of The Act Herein Would Seriously Burden The Liberties Of DCS Parents And Teachers

As the Court of Appeals has stated, the appellee parents have a major stake in the inviolability of the religious regime of the school they have chosen for their children. (A. 23-26). If the State can require the continued presence in DCS, of teachers whose lifestyles and conduct conflict with DCS' tenets, DCS parents' rights to choose a religious education for their children is obliterated. The teacher who enters service in DCS embraces a religious vocation. (Tr. 114, 118). For both parents and teachers the fabric of the institution is unraveled where government may invade the religious organism on the side of those who choose to defy it. The loyal faculty are placed in the position of laboring to support doctrines which the State supports dissident faculty in rejecting.

The enforcement of the State's philosophy and demands herein would seriously injure the religious liberties of appellees. It would create a precedent holding, in fact, that religion is scarcely more than a tenant-at-will in governmental housing. The vital cause of achieving justice for women is not advanced by pressing contrived claims such as the State presses here, especially in view of an immemorial public policy recognizing religious civil rights.[19]

19. Observance of the Scriptural precepts (*e.g.*, Matthew 18:15-17) which dictate the DCS "Good Report" policy is not confined to DCS. The Anabaptist faiths (*e.g.*, Mennonite and Amish) prohibit recourse to the law. *See* CHRISTIANITY DEFINED, 71 (Reformed Mennonite Church 1940); J. A. HOSTETLER, AMISH SOCIETY, 252 (3rd ed. 1980). The Code of Canon Law of the Roman Catholic Church requires teachers in Catholic Schools to be "outstanding for their correct doctrine and integrity of life". (Canon 803, §2). The Canons impose penalties for "offenses against religion and the unity of the Church" (Canons 1311, *et seq.*) and processes within the Church for the adjudication of disputes. (Canons 1400 *et seq.*). *See* CODE OF CANON LAW (Canon Law Society of America 1983).

C. Application Of The Act To Dayton Christian Schools Is Not Justified By A Compelling State Interest[20]

The State makes the sweeping claim that the principle of equality outweighs rights of religious liberty. Without citation to authority, the contention is made that "the most fundamental value underlying the freedom of religion and all other first amendment freedoms . . . is that of equality. . . . Freedom of religion is most certainly a right basic in our country's fiber, but equality is the cornerstone of our Constitution." Br. 22. In other words, religious liberty must always be subordinated in favor of one who shows that the protection of religious freedom, in any particular situation, results in inequality of treatment — whether that treatment concerns race or sex or, by necessary extension, age, handicap, or any other legislatively protected status. This view contradicts the Constitution's principle that first amendment liberties are to be preserved for their own sake.

Dayton Christian Schools no more denies the public interest involved in sanctions against unfair treatment of women than it would dispute the need for sanctions against unfair treatment based on race.[21] In no way does DCS contest the conclusion of the Court of Appeals that the anti-discrimination statutes may be applied to religious institutions where religious belief is not implicated. (A. 38).

At the threshold, no injury to Mrs. Hoskinson's liberties has occurred. The State contends that DCS attempted to deprive her of "her personal freedom to raise her children as she wanted." Br. 26. To the contrary, it is Mrs. Hoskinson who has invoked the power of the State to deprive DCS of *its* freedom to

20. The most compelling of all societal interests is the protection of the exercise of First Amendment rights. When the application of legislation collides with such exercise, the question must never be whether the exercise passes muster with the application, but whether the application passes muster with these protected rights.

21. The State's brief unaccountably condemns those who regard "women as the 'weaker' sex", indulge "romantic paternalism", persist in "archaic" generalizations or use "stereotyped distinctions" between the sexes. Br. 23. Neither DCS, the Court of Appeals nor this Court would have expressed or would countenance any such views.

pursue its faith as its doctrine commands. Mrs. Hoskinson was free to raise her family as she wished. Dayton Christian Schools has simply determined that it does not wish to be a party to a child-rearing practice it does not sanction. The State is not free to coerce a religious body into breaching its doctrine by forcing the continued employment of a religious dissident contrary to its teachings — teachings which the dissident defies.

The State, in support of its claim of compelling state interest, cites *Roberts v. United States Jaycees*, 468 U.S. ____, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). *Roberts* strongly underscores the high importance of statutes aimed at barring the denial of equal opportunities on account of sex with the frequent resultant "stigmatizing injury" to women. 82 L.Ed.2d at 476. *Roberts* is distinguishable on several grounds, one of these being that it deals with an organization engaged largely in commercial activity. *Id.* at 485 (O'Connor, J., concurring in part). *Roberts*, nevertheless, is substantially supportive of the position of DCS in the present case in its reaffirmation that the Bill of Rights affords "certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 471.

Nor is there a compelling interest in the State's encroaching upon the covenanted mechanisms of a voluntary religious association for arbitrating disputes or disagreements over what practices are commanded, forbidden, encouraged or discouraged by the precepts of the common faith which all are engaged in fostering and inculcating. As the Court has recently stressed: "According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, *id.* at 474.

The State warns the Court of a "domino" effect which its affirmance of the judgment below might trigger. Br. 29-30. The examples are scarcely realistic. More to the point would be the limitless effect of a holding that those who freely and knowingly assent to the rules of a religious body, and who then choose to defy those rules, have a right, at a minimum, to a governmental

investigation of that body. The phrase (perhaps too often carelessly used) — "chilling effect" — would now rightly describe the apprehension which would permeate every church, synagogue, religious school, convent, or seminary.[22]

Escalating its theme of "domino" effect, the State asserts that "[t]he ultimate result of the Sixth Circuit's decision is to withdraw all religiously affiliated institutions, and those who will claim to be, from the purview of the Act." Br. 30. Not only is it true that the State thus misrepresents what has been claimed by appellees here (that only religiously-mandated actions are protected); its argument ignores the role of courts in finding facts, interpreting statutes, and applying the requisite tests for free exercise violation. The same argument was made and rejected in *Thomas* — that every person with a religious hangup could now take *carte blanche* advantage of the Supreme Court's ruling. *Thomas v. Review Board*, 450 U.S. at 719.

The State also expresses fear that, if the Court upholds DCS herein, "the cumulative impact of its holding will significantly impair the State's goal of eradicating employment discrimination." Br. 31. This it bases on the idea that sanctioning discrimination in a grammar school will exert " 'a pervasive influence on the entire education process' " (citing *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Norwood v.*

22. The State seeks also to base its claim of compelling state interest on the grounds that (a) here, as contrasted with the situations in *Sherbert* and *Thomas*, an individual who is a third party will suffer economic loss if the judgment below is not reversed and (b) the claimants in those cases did not engage in conduct otherwise unlawful. Br. 28. But any economic loss sustained by Mrs. Hoskinson is of her own making. She breached her careful commitment to DCS and even refused its grievance process. Moreover the fact that an individual is involved is no justification for denial of religious liberty to DCS. Whether adjudication is sought in cases involving disputes between government and individuals (*e.g., Yoder*), government and religious institutions (*Catholic Bishop*), religious institutions and individuals (*Serbian Eastern Orthodox Church*), or private parties and other private parties (*Jones v. Wolf*, 443 U.S. 595 (1979); *New York Times v. Sullivan*, 376 U.S. 254 (1964)), the government may not infringe the protected liberties of those involved. That "unlawful" activity is involved here constitutes a precise parallel to the "unlawful" conduct of the parents involved in *Yoder*.

Harrison, 413 U.S. 455 (1973); and *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980). Br. 30-31. The reverse is correct. Granting government sanction to conduct such as that of Mrs. Hoskinson in a religious school imparts a very powerful lesson to all connected therewith: the State will overset Scripture at its discretion and will "prevent those schools from observing their religious tenets." *Bob Jones University*, 461 U.S. at 603-604.

The State contends that the anti-retaliation provision of the Act (Section 4112.02(I)) must be imposed upon DCS because "[t]he endeavor to end discrimination certainly would be fruitless if persons seeking redress under anti-discrimination laws were not protected from retaliation for taking such action." Br. 25. Thus, the State argues that the observance by any religious body of a doctrinal command in the form of DCS' "Good Report" policy must be suppressed. If the State were serious in its claim that "the endeavor to end discrimination" in the nation would be rendered fruitless by a decision upholding DCS' liberty to follow its "Good Report" doctrine, then the State ought to have sought, upon the trial, to have borne its burden of proof of its claim. As the record now stands, one employee of one religious school is actually being affected by the "Good Report" policy. It is mere speculation for the State to assume that rampant discrimination against religious school teachers would be sanctioned by a refusal to suppress the DCS grievance procedure in question.

Deserving of consideration are arguments made by the *amicus*, American Jewish Congress. While on all other issues supportive of DCS, the AJCongress argues that (1) there is a compelling state interest in government adjudication of private discrimination complaints; (2) suppression of the DCS "Good Report" policy is justified because otherwise an employee of a religious school could not, without fear of reprisal, report to civil authorities a fire safety violation or an instance of child abuse (Brief Amicus Curiae Of The American Jewish Congress, 45-46); and (3) that if the anti-retaliation provision is permitted to prevail, it "simply allows the state, subject to judicial review, to determine whether or not a valid free exercise or other constitutional objection exists." (*Id.* at 47). These arguments, on careful consideration, prove insupportable.

First, permitting the State to exercise adjudicatory power in matters relating to the religious discipline of religious bodies gives the State a role not only in the governance of religious institutions, but in the deciding of religious disputes. Both roles are constitutionally barred. The State interest in anti-retaliatory statutes cannot rise higher than the interests they seek to protect. Here the underlying complaint is in respect to a matter solely within a religious body's jurisdiction, and just as that body may define what conduct makes one a member, so it may define what procedure shall be followed if those substantive standards have not been met. A grounds crew worker may invoke the anti-retaliatory principle if fired for bringing an FLSA claim; if a church decides that a priest can no longer function because his views on the Trinity are heterodox, no civil court may second-guess that judgment or the procedures invoked to effect it.

Second, there is an obvious distinction to be made between a statute which requires a teacher to report, for example, child abuse (under the Child Abuse Law cited by the State (Br. a-1, *et seq.*)) and a statute such as the Ohio Civil Rights Act which places no duty upon a teacher to report discrimination. The societal interest in the employee's reporting in the first situation is manifestly a different and greater interest than the interest in the second situation (which encompasses cases, such as the present case, where a teacher has attempted to get the State to act on her behalf in a personal doctrinal dispute with her employer).

Third, it is not correct to say that the Act simply allows the State to review complaints and constitutional claims, subject to judicial review. As is elsewhere stated (pages 17-19 *ante* and pages 31-34 *post*), such due process is effectively barred by the Act, and the process which is actually followed fosters excessive entanglements.

Repeatedly, the appellees have stressed that they do not claim that religious institutions must be exempt from all anti-discrimination laws. They do claim that where the conduct of a person entrusted to impart religious doctrine is itself contrary to that doctrine, doctrinal integrity is imperiled and the religious institution must be free to disassociate itself from the dissident party.

If the State of Ohio would now simply permit each religious group to "flourish" (or perish) "according to the zeal of its adherents and the appeal of its dogma" (*Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952)), instead of suppressing the practice of doctrines it finds do not conform to its own social policies, it will do absolutely no damage to the cause of sexual equality generally. Moreover, by tolerance of religious differences, it would be doing exactly what the General Assembly of Pennsylvania (with no discernible adverse effects on economic equality) has already done in keeping official hands off religious doctrine by placing the following limitation in its Human Relations Act:

> "Notwithstanding any provision of this clause, it shall not be an unlawful employment practice for a religious corporation or association to hire or employ on the basis of sex in those certain instances where sex is a bona fide occupational qualification because of the religious beliefs, practices, or observances of that corporation, or association."

Pa. Stat. Ann., Title 43, §955(a) (Purdon Supp. 1985).

III. IMPOSITION OF THE CHALLENGED PROVISIONS OF THE ACT UPON THE DCS MINISTRY VIOLATES THE ESTABLISHMENT CLAUSE

This Court has defined the concept of "establishment of religion" to connote three things: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). The Court has several times provided explication of the third of these manifestations of establishment. It is a form of governmental involvement with religion which injures religion (". . . would tip the balance toward government control of churches or governmental restraint on religious practice." *Id.* at 669-670).[23]

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23. Appellees recognize the argument of some *amici* and appellants herein that it is solely the Free Exercise Clause which protects religious bodies against such injury. But the fact that the Free Exercise Clause affords such protection (and does indeed to DCS in this case), does not preclude a protective operation

Thus the Establishment Clause is intended to prevent not only the intrusion of religion into the precincts of government but the intrusion of government into the precincts of religion. *Lemon*, 403 U.S. at 614. Avoided, therefore, must be " 'programs whose very nature is apt to entangle the state in details of administration' " (*id.* at 615), or which are "accompanied by varying measures of control and surveillance" (*id.* at 621), or provide "an intimate and continuing relationship between church and state." (*Ibid.*).

The foregoing declarations by the Court were not limited to situations in which government aid to religious bodies was at issue (*i.e.*, to situations of "sponsorship" or of "financial support"). While indeed in *Lemon*, *Meek*, etc., subsidy to religious schools was held forbidden because of the "prophylactic contacts" (*Lemon*, 403 U.S. at 619) which would be necessitated to assure against state support of religion, the vice of the entanglements was not found in the aid given religion; the vice of the aid was that it brought about entanglements. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court found fraught with potential entanglements a situation not involving "aid", but, instead, the jurisdiction of a government agency over a religious school.

Application of the Ohio Civil Rights Act in the present case calls for a highly intrusive involvement of government in the religious employment relationships of a religious institution. It is, hence, violative of the Establishment Clause.

The State's chief argument that its entertaining of a charge of discrimination against a religious institution is non-entangling rests upon its assertion that the Act's provision against sex discrimination is religiously "neutral". Br. 35. Since sex discrimination is a "neutral", not religious, matter, "the Commission would not be required to delve into DCS' religious tenets or the

NOTES (*Continued*)

of the Establishment Clause in those situations where government seeks to enter into highly intrusive relationships with religious bodies. The Court long since has held that legislation which has a primary effect of *inhibiting* religion is forbidden by the Establishment Clause. *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).

sincerity of its beliefs. Br. 10-11. But the State admits that under its process (derived from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)) for adjudicating whether a religious decision was a mere "pretext" for discrimination, it must examine the motivation of the religious institution to determine whether the "real reason" for the institution's decision was religious or was based upon sex. Br. 35. It was precisely this method of inquiry into the "good faith" of the assertion of religious defenses which was condemned by this Court in *Catholic Bishop*:

> "It is not only the conclusions that may be reached by the [agency] which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusion."

440 U.S. at 502. *Accord*, *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

It being recalled that the Act contains no religious exemption (except in its housing provision, Section 4112.02(H)), all religious institutions are therefore subject to continual State scrutiny with respect to doctrinally based sex discrimination (and also employment on the basis of religion). Without receipt of a complaint, the Commission is empowered to undertake "investigations of problems of employment discriminaton", to subpoena witnesses, require production for examination of books and papers, and to "have access at all reasonable times to premises, records, documents, individuals and other evidence or possible sources of evidence." (Section 4112.04(B)). Far from being mere "prophylactic" contacts with a religious institution, such practices are highly invasive in nature, particularly as they relate to examination of doctrine and doctrinally motivated actions. Equally broad investigatory powers are given the Commission when proceeding upon complaint (Section 4112.05(B)), and after a decision adverse to the respondent, the Commission is required to issue a cease and desist order, and "take such other affirmative or other action as will effectuate the purposes of Section 4112.01. . . ." (Section 4112.05(G)). Thereafter, compliance reports may be required. (*Ibid.*). In spite of the protest of the State in its brief that the Proposed Consent Order in the present

case is "a proposal only", that Order fell well within the statutory responsibilities placed upon the Commission to police those against whom it has proceeded. It is to be noted that the State, in attempting to minimize the significance of the Proposed Consent Order, did *not* say that this was not the standard order invariably applied to respondents, and it would be naive to assume otherwise. The Court of Appeals was completely correct in its characterization of these processes as excessively entangling. (A. 48-49).[24]

Two additional features of the statutory scheme stand out with special prominence in terms of "active involvement of the sovereign in religious activity": the provision requiring advance certification of bona fide occupational qualifications based upon religion and the provision for posting of notices.

Section 4112.02(E) contains a series of prohibitions on activities of employers but allows exceptions "where based on a bona fide occupational qualification certified in advance by the Commission." The restrictions should now be looked at in terms of the life of a religious institution — for example, DCS. By virtue of these restrictions, DCS would be barred from, *inter alia*, *any* form of religious inquiry or recordkeeping. But DCS could go to the Commission and attempt to make its case as to why it would need to obtain and record such information. The Commission (the State) would now be empowered to pass upon the religious questions raised by DCS. DCS would be forced to submit to this inquiry and judgment at the price of standing in violation of the Act.

24. Should Ohio's statute be amended to preclude OCRC jurisdiction over the doctrinally mandated employment practices of religious institutions, and should a charge of sex discrimination thereafter be lodged which would arguably thus fall outside its jurisdiction, OCRC would still need to conduct a limited inquiry into two matters: (a) whether the institution is religious in nature; and (b) whether the institution is fraudulently claiming that a religious tenet or practice is in some way involved. *Thomas v. Review Board*, 450 U.S. at 716. This limited inquiry would be necessary, however, to protect, rather than suppress religious freedom, and would be far less intrusive than the State's present, totally enveloping procedure for fully adjudicating a charge of discrimination against a religious body through to its issuance of a cease and desist order, and exercising its continuing jurisdiction thereafter.

Section 4112.07 requires DCS to post a notice informing all persons in its ministry of the provisions of the Act. These include the provision that DCS may not choose its employees on the basis of religion or dismiss them on such basis. By this requirement the State reaches into the precincts of a religious body and indeed makes the religious body tell the people in its ministry that it is, in effect, a law violator and that it has no right to maintain the integrity of its religious regime.

While all of the foregoing requirements of the Act, as applied to DCS, violate DCS' Free Exercise rights, they plainly also constitute the kinds of "active involvement of the sovereign in religious activity" which violate the Establishment Clause.[25]

IV. THE ACT IS UNCONSTITUTIONALLY OVERBROAD

Where broad and imprecise statutory provisions substantially impinge upon protected conduct, those provisions must fall. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

The unconstitutional reach of subsections (A) and (E) of §4112.02, insofar as they apply to religious institutions, can perhaps best be seen when the bizarre range of their application is considered. By their terms,

— St. John's Church (a Lutheran congregation) could not, solely on account of the applicant's religion, refuse to hire as pastor an individual of some other religious faith.

25. Making its own contention of Establishment Clause violation, the State argues that judgment in favor of appellees would create a "religious preference". Br. 40-41. While there are situations in which "an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause . . ." *Yoder*, 406 U.S. at 220-221, in the present case, as in *Yoder*, free exercise values plainly outweigh wholly speculative Establishment Clause interests. The State's position on this point really means that no accommodation of religion — such as was seen in *Sherbert*, *Yoder* and *Thomas* — is permissible. The Free Exercise Clause would be read out of the Constitution in favor of the Establishment Clause. Nor is here involved a situation analogous to that in *Estate of Thornton v. Caldor, Inc.*, ____ U.S. ____, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985), where it would be commanded that religious concerns "automatically control . . . all secular interests in the workplace." 86 L.Ed.2d at 563.

— Yeshiva Academy (a Jewish day school) could not, solely on the ground that an applicant for a teaching job was a Roman Catholic, refuse to hire that applicant for its Hebrew Department.
— Good Shepherd Convent (an Episcopal novitiate for nuns) could not, solely on the ground that a teacher converted to Unitarianism, refuse to rehire that person.
— St. Mary's Seminary (a Roman Catholic seminary for training men for the priesthood) could not, solely on the ground of her sex, refuse to hire a woman as an instructor even though the Catholic Church might forbid use of female instructors within the Seminary.

Those are but a few examples of the myriad applications which the overbreadth of these statutory provisions permits.[26] Section

26 Though not here challenged as they may apply to non-religious institutions, these provisions as they relate to a substantial class of religious institutions are nonetheless facially defective since their flaws inhere in the language of the provisions themselves. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

4112.02(E)(5) indeed flatly prohibits a religious institution to limit employment to its own adherents:

> "It shall be an unlawful discriminatory practice:
> * * * * * * * * *
> "(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer . . . prior to employment . . . to:
> * * * * * * * * *
> "(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment . . . opportunities of any group because of the race, color, religion, sex, national origin, handicap, age, or ancestry of such group;"
> * * * * * * * * *

Leaving aside for the moment the reference to "bona fide occupational qualification" (which, in any event, does not pertain to hirings or dismissals), the foregoing provision would bar a fundamental Christian school from pursuing a policy of hiring only evangelical Protestants, for example, or an Orthodox Jewish school from pursuing a policy of not hiring non-Jews. Such a limitation is a most obvious limitation of religious liberty. "Bona fide occupational qualification" is not defined in the statute, though DCS has been threatened with an order which would preclude it from even inquiring into the religious beliefs of its teachers and teacher applicants without first seeking OCRC permission to do so. Thus, the statute leaves to the Commission the vital power to restrain or not to restrain religious activity, and without any guiding and limiting standards at all.

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that the judgment of the United States Court of Appeals for the Sixth Circuit be affirmed.

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REPLY

BRIEF

Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-488

In The Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., et al
Appellees.

ON APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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A. A Religious School Does Not Enjoy An Absolute, Constitutionally Protected Right to Freedom From Governmental Regulation.

Dayton Christian Schools, Inc. (DCS) asserts that its pervasively religious nature entitles it to absolute immunity from the application of the State's civil rights laws. This argument was properly rejected by the district court, (A-96), and found not dispositive by the court of appeals, (A-9, note 10). The constitutional principles articulated by this Court do not support any such absolute constitutional immunity for religious schools.

In its brief, DCS tells the Court it claims constitutional immunity from secular involvement in its employment decisions only when such decisions are "doctrinally founded," (DCS Br. at 9), or "religiously necessitated," (DCS Br. at 16). DCS, however, argues all activities of the school are an exercise of religion, and thus characterizes itself as an "absolutely religious" institution. (DCS Br. at 14). It claims its "activity and, in particular, its relationship to its teachers, is an 'exercise of religion'," because DCS considers the teacher to be a "missionary." (DCS Br. at 15, 3). It is apparent, therefore, that DCS claims nothing less than full immunity from secular law. Moreover, DCS recognizes it is "constitutionally indistinguishable from Catholic, Lutheran, Christian Reformed and other religious schools of 'predominant sectarian character'." (DCS Br. at 14). Therefore, if accepted, DCS' claim to absolute constitutional immunity will apply to all religious schools.

DCS extrapolates its claim to immunity from the recognized right of *churches* to self-governance. *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952). It argues that because the State recognizes the right of religious institutions to self-governance in matters of purely ecclesiastical concern, the State must extend this same immunity to schools, even when they structure their activities such that secular and sacred objectives are inextricably intertwined. (DCS Br. at 16). Contrary to its assertion, however, there is indeed a very

principled basis on which to distinguish schools like DCS from churches, seminaries, Sunday schools or other purely religious institutions. There can be no state interest in strictly ecclesiastical matters of religious doctrine, religious worship or religious instruction, and there is, therefore, no state involvement in such matters. On the other hand, the activities of religious schools which choose to be recognized as an alternative to public instruction very much affect a legitimate state interest. This Court has always recognized that religious schools simultaneously pursuing the goals of religious instruction and secular education stand on a different constitutional level than churches and purely religious institutions.

In *Board of Education v. Allen,* 392 U.S. 236, 247 (1968), the Court found "as a sensible corollary of *Pierce v. Society of Sisters,"* that "if the State must satisfy its interests in secular education through the instrument of private schools, it has a proper interest in the manner in which these schools perform their secular educational functions." *See also Wolman v. Walter,* 433 U.S. 229, 236 (1977) (State has a "legitimate interest" in providing "a fertile educational environment for all school children of the State."); *Wisconsin v. Yoder,* 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.").

The State's genuine and legitimate interest in the manner in which religious schools perform the secular educational function is already manifest in extensive regulatory efforts.[1] The State of Ohio, for example, requires nonpublic schools chartered by the State to comply with regulations delineating minimum curriculum requirements and providing periodic

[1] The State's interest in the educational setting is also manifest in the aid it provides to the students who attend religious schools. The State provides direct aid, in the form of secular textbooks and tests, diagnostic and therapeutic services and busing, to the extent permitted under this Court's holding in *Wolman v. Walter,* 433 U.S. 229 (1977). DCS' statement that it refuses to participate in any form of governmental aid, (DCS Br. at 2), is disingenuous. The testimony at trial was that the DCS community was receiving state aid for busing and auxiliary services, and intended to continue to participate at least in the busing program in the future.(Tr 35-37).

assessment of pupil performance. Ohio Admin. Code Rule § 3301-35-02, (a-7). Such graded course of study is required to include "a balanced presentation" of the relevant contributions to society of men and women as well as ethnic and racial groups. Ohio Rev. Code § 3313.60, Ohio Admin. Code Rule §§ 3301-32-02(B)(1)(a)(i), 3301-35-04, (a-7, a-25). It likewise must include instruction in physical education and health education. *Ibid.* State regulations provide for the certification of teachers in the nonpublic schools and require that teachers be employed and provided inservice education without discrimination on the basis of age, color, national origin, race or sex. Ohio Admin. Code Rule § 3301-35-03(A), (a-17). The schools are required to prescribe a code of pupil conduct that includes provisions to safeguard pupil due process rights. Ohio Admin. Code Rule § 3301-35-03(G), (a-23). Schools chartered by the State are required to have an organized program of school health services, which include immunization requirements and emergency medical authorization. Ohio Admin. Code Rule § 3301-35-03(D), (a-22). Each teacher has a duty to report suspected child abuse immediately and directly to secular authorities. Ohio Rev. Code § 2151.421.

The Government's interest in education is not limited to the quality of secular instruction or the physical safety of the children. It properly extends to matters of school administration that impinge on important secular values. *Bob Jones University v. United States,* 461 U.S. 574 (1983); *Runyon v. McCrary,* 427 U.S. 160 (1976). In *Bob Jones University,* the Court relied on the distinction between "religious *schools*" and "churches and purely religious institutions," 461 U.S. at 604 (note 29), and reaffirmed the Government's right to act when matters of school administration impinge on important secular values. As is argued by DCS, the religious schools in *Bob Jones University* argued that the IRS' denial of tax-exempt status to private schools having racially discriminatory policies should not apply to them because the schools were entitled to an exemption "as a 'religious' organization, rather than as an 'educational' institution." 461 U.S. at 604 (note 32). The Court, however, held that because Bob Jones was "both an educational institution and a religious institution," the IRS

policy properly applied to it even though its discriminatory policy was based on genuine religious belief. Ibid.

Thus, the State's right to apply its civil rights laws in this setting finds continuing support in this Court's decisions. Contrary to DCS' contention, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), did not signal a major change in the Court's attitude toward regulation of religious schools, and does not support DCS' sweeping assertion that the relationship between such schools and their teachers is immune from all governmental regulation. It was not the nature of the institutions alone that provoked constitutional concerns on the part of the Court in *Catholic Bishop*. It was, in addition, the recognition that all activity in the school could be deemed a term or condition of employment subject to scrutiny by the National Labor Relations Board. The Court's observation that the inevitably pervasive involvement of the Board with religious schools could give rise to serious constitutional questions certainly did not bestow an unfettered right of autonomy on all religious schools for all purposes.

B. Application Of The Ohio Civil Rights Act In This Instance Is Consistent With The Accommodation Required By The Free Exercise Clause.

The State's recognition of the distinction between religious schools and churches and other purely religious institutions disposes of DCS' fears that application of the civil rights laws will extend into those purely religious settings. Adoption of the State's position will not mean the anti-discrimination laws will be used "to require the Roman Catholic Church to ordain women or Hasidic congregations to accept women rabbis." (DCS Br. at 23). Nor would adoption of the State's position mean a Lutheran congregation must hire a Baptist pastor, a Yeshiva Academy must hire Christian applicants to teach in its Hebrew department, or a Catholic seminary cannot refuse to hire a female instructor. All these examples fall on the "purely ecclesiastical" side of the line already drawn by the Court. The State seeks to address only

discriminatory practices in religious schools which are not "purely ecclesiastical" institutions because of their provision of secular education as an alternative to public schools. Because discrimination in the educational setting is directly contrary to state and national public policy, the application of the Act in this instance, is a fair and proper corollary to the religious school's right to hold itself out as an alternative to public education.

Moreover, even in religious schools, where the State's interest is substantial, the State accommodates the schools' need to employ only coreligionists. The State provides a mechanism whereby such schools can assure that their need to employ only members of their own faith as teachers is recognized. Ohio law quite clearly does state it is not an unlawful discriminatory practice for an employer to follow a policy of denying or limiting the employment opportunities of any group because of the religion of such group where that policy is based on a bona fide occupational qualification certified in advance by the Ohio Civil Rights Commission. Ohio Rev. Code § 4112.02(E)(5). Thus, to the extent DCS continues to have fears about its ability to adhere to its policy of hiring only born again Christians to teach in its schools, it has available to it now, as it did in 1979, the means of allaying those fears. The State's request that bona fide occupational qualifications be certified in advance is not an unreasonable restraint on religious exercise. Advance certification is an effective protection for the religious institution because, once granted, the bona fide occupational qualification is dispositive of any charges of religious discrimination filed against the institution. Moreover, the failure to certify a bona fide occupational qualification in advance would not preclude consideration of evidence that persons who are not of the religious institution's faith are not qualified to teach at the institution.

Contrary to DCS' assertion, the Ohio Civil Rights Commission can and has considered religious justifications for employment decisions even in situations where a bona fide occupational qualification is not sought in advance. Both prior to and after the commencement of this litigation, the commis-

sion dismissed complaints of religious discrimination brought against religious schools. In 1974 and again in 1976, the commission dismissed charges against religious schools which had terminated teachers because they were not Roman Catholics. *In The Matter of St. Mary of the Falls*, Complaint No. 948; *In The Matter of Saint Michael's School*, Complaint No. 2726. In 1983, the commission dismissed *Menz v. St. Pius School*, Complaint No. 3823, which involved a charge that the school had terminated a teacher because he was teaching a nondenominational bible study class to its Catholic students in the evenings.

There are, however, significant distinctions between these cases and DCS' firing of Mrs. Hoskinson. The schools involved in these other cases were discriminating among teachers solely on the basis of religion and not on the basis of their sex. More importantly, they did not fire the teachers in retaliation for having sought clarification of their statutory civil rights. DCS attempts to characterize Mrs. Hoskinson's termination as a case of only religious discrimination. (DCS Br. at 22-23). The State does not deny that religious philosophy was involved in the employment decisions DCS made with respect to Mrs. Hoskinson. But DCS cannot deny those decisions were also sexually discriminatory and constituted retaliation under the statute. DCS intended not to renew Mrs. Hoskinson's contract because of a religious philosophy that is inherently discriminatory toward women. The biblical chain of command was invoked in this case because Mrs. Hoskinson engaged in conduct protected by the statute. This case does not involve solely religious considerations. Both secular and religious factors abound in Mrs. Hoskinson's termination. Therefore, the termination cannot be absolutely immune from legitimate secular review.

For the foregoing reasons, a grant of full constitutional immunity to religious schools based solely on the nature of the institution, is not appropriate because it precludes consideration of secular factors such as those present in this case. DCS seeks to avoid the balancing test the Court has developed to protect both the religious and governmental interests involved

in free exercise cases. Holding that religious schools are not exempt from the Act solely on the nature of the institution will not, of course, be dispositive of the schools' free exercise claims. *Bob Jones University v. United States*. Such holding, however, will properly focus the inquiry on the nature of the burden on the school's practice of its religious beliefs, the importance of the State's interest and whether that interest overrides the burden on religious practice.

C. Application Of The Act To DCS Does Not Impermissibly Burden DCS' Religious Liberty Because It Is Essential To The State's Interest.

Since DCS is not a purely religious institution entitled to complete immunity, the free exercise analysis properly follows that applied in the traditional liberty of conscience cases, all of which hold that the state may burden, and even prohibit, practices founded on genuine religious beliefs, if the burden is essential to accomplish an overriding governmental interest. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the government's interest in eradicating racial discrimination in education was sufficient to justify a burden on a religious school's practice of its racially discriminatory beliefs. In *United States v. Lee*, 455 U.S. 252 (1982), the governmental interest in the integrity of the social security system was sufficient to require an Amish employer to act contrary to his religious beliefs. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the State's interest in child labor laws was sufficient to allow the State to prohibit practices of Jehovah's Witnesses which were scripturally required. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the State's interest in enforcing compulsory education laws for an additional two years beyond eighth grade was held insufficient not only because of the overwhelming burden on Amish religious practices, but also because compulsory attendance for two more years was not essential to the attainment of the State's interest.

1. DCS' characterization of the burden is not supported by the record in this case.

The State acknowledges that application of its civil rights laws to DCS will burden the school's practice of its religious beliefs. Application of the Act will limit DCS' freedom to act on its belief that a mother must stay in the home and could impose liability for retaliatory actions taken against employees who violate the school's biblical chain of command philosophy by questioning discriminatory practices. DCS, however, contends that if it is compelled to retain a teacher whose conduct conflicts with some of its tenets, "DCS parents' rights to choose a religious education for their children is obliterated," and "the fabric of the institution is unraveled." (DCS Br. at 25). These sweeping overstatements by DCS simply are not supported by the record.

The district court specifically found the threatened state action would have a limited effect on Appellees' ability to continue to believe and practice their espoused religious tenets. With respect to DCS' belief in the biblical chain of command, the Court found "that the threatened state action in the present matter does not give rise to concerns over the future viability of the complainants' religion such as were presented to the Supreme Court in *Yoder*." (A-104). The court recognized there is a direct conflict between the Act and DCS' religious beliefs when an aggrieved employee, contrary to the biblical chain of command, seeks legal protection under the Act. Nonetheless, the court found:

> There is nothing in the record, however, to suggest that there will be frequent or recurring clashes between Plaintiffs' employment practices and the statute's proscriptions against sex discrimination. In all liklihood, the majority of disputes arising within the school will continue to be resolved internally.... For the most part, Plaintiffs will continue to be free to believe and to practice their belief in the internal resolution of differences.

(A-105). The district court likewise found application of the Act would not unduly interfere with DCS' belief in the role of the mother because "[n]othing in Chapter 4112 would force any of the Plaintiffs themselves to act contrary to this belief. . . . Instead, all that would be asked of Plaintiffs is that they not take adverse employment action against a woman if she does not concur in their interpretation of what the Bible requires of a mother." (A-105, 106).

While the court of appeals disagreed with the district court's assessment of the burden, it never held any of the district court's findings of fact to be clearly erroneous. Significantly, the court of appeals, unlike DCS, recognized that "an order of reinstatement. . .is not at issue in this case." (A-30, note 30). DCS' argument that the very life of its religious exercise is threatened by the prospect of having Linda Hoskinson return to her teaching position is inappropriate because it is a potentiality that may never occur. The Ohio statute confers discretion on the commission to fashion an appropriate remedy if it finds unlawful discrimination or retaliation. Ohio Rev. Code. § 4112.06. Reinstatement is discretionary in situations where it is unlikely that the parties can resume a mutually satisfactory employment relationship. *Shore v. Federal Express*, 777 F.2d 1155 (6th Cir. 1985). Following federal precedent, the Ohio Civil Rights Commission has not ordered reinstatement when it has found the trust necessary to form a working relationship has been irreparably torn. *In the Matter of Stamps v. Independent Order of Oddfellows*, Complaint No. 3266 (1980) *aff'd Independent Order of Oddfellows v. Ohio Civil Rights Commission*, Case No. 80-CV-2133, (Clark Co. Cm. Pleas, 1980). The commission's ability to fashion a remedy that does not include reinstatement provides a means through which it can accommodate genuine religious concerns without abdicating its own interests in protecting employees from discrimination and retaliation.

The magnitude of the actual burden application of the Act would exert on the exercise of DCS' religious beliefs is best considered in the context of the Court's previous decisions.

The actual burden on DCS' religious exercise is certainly less than that in *Yoder*, for the burden in that case could have resulted in the destruction of the Amish church community. 406 U.S. at 212. The potential for entanglement is much less than that which concerned the Court in *NLRB v. Catholic Bishop*. While nearly everything that goes on in the schools is arguably a condition of employment within the purview of the labor relations act, no such pervasive involvement is threatened in this case. The civil rights act is concerned only with those employment decisions alleged to be unlawfully discriminatory or retaliatory. On the other hand, the burden here rises to a higher level than that threatened in *Bob Jones*, since the IRS policy at most could only make it more costly for Bob Jones to practice its racially discriminatory beliefs. The burden in this case would appear to be most closely analogous to that considered in *United States v. Lee*, 455 U.S. 252 (1982). In *Lee* this Court accepted the Amish employer's contention that both the payment and receipt of social security benefits is forbidden by the Amish faith. 455 U.S. at 257. There was, therefore, what Justice Stevens described as an irreconcilable clash between the employer's religious obligation and his civil duty. Likewise here there is a direct conflict between DCS' religious obligation to follow the biblical chain of command and its civil obligation to not retaliate against employees who seek to assert their civil rights. There is a similar conflict between DCS' religious philosophy regarding women and the anti-discrimination law. As the Court observed in *Lee*, however, the conclusion that there is conflict between religious and civil obligation "is only the beginning... not the end of the inquiry. Not all burdens on religion are unconstitutional. . . . The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." 455 U.S. at 257.

2. The eradication of discrimination is an interest of the highest order.

DCS, and several of the amici in its support, would have the Court hold that religious interests prevail over state interests except in those limited circumstances where a religious practice results in physical harm. Such a result would greatly broaden the protection of the free exercise clause and would be fundamentally at odds with the expanded role of government in contemporary American society. The school denigrates virtually all important social welfare legislation of the past century by arguing that only in cases of physical harm can the State's interest outweigh religious exercise. Under such an approach, the State's interest in compulsory education laws, minimum wage laws and unemployment compensation laws would be ignored. Under the physical harm standard, the social security system could not have overbalanced the Amish employer's religious objections in *United States v. Lee*. Even the national policy against race discrimination in education would have been insufficient to overcome the objections of *Bob Jones University*. The contrary holdings in each of these cases support the conclusion that indeed social welfare legislation can be an interest of the highest order. As was found by both courts below, the State's interest in eradicating discrimination is a compelling interest, which must be weighed in the balance with the religious exercise. (A-36, A-106-108).

3. The protection of employees who question the lawfulness of employer conduct is itself an overriding governmental interest.

The State's interest in prohibiting retaliation against employees who question the legality of employer conduct is likewise an interest of the highest order.[2] While the question

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[2]The district court's opinion as reported in the Appendix to the Jurisdictional Statement contains a typographical error on page A-108. The second sentence in the first full paragraph should read: "Moreover, because the state does have a compelling interest in eliminating the various forms of sex discrimination, the state likewise has a compelling interest in insuring that individuals be free to protect their rights under Chapter 4112 without fear of employer reprisal."

arises in the context of civil rights laws, this case involves a fundamental question regarding a state's ability to enforce its laws generally. A religious policy like the biblical chain of command seriously undermines the State's ability to administer any laws because under such policies persons are not free to alert the State to potential violations of law. In order to be willing to question employer conduct, an employee must feel secure that the State can effectively protect that employee from reprisal. Therefore, protection from retaliation for reporting a perceived violation of a law cannot depend on the ultimate disposition of the alleged violation. To do so would be to deny any degree of predictability to persons making complaints, thus rendering anti-retaliation provisions meaningless.

The importance of anti-retaliation provisions is evidenced by the number of federal laws, in addition to Title VII, that contain protection for employees questioning violations.[3] In addition to the federal anti-retaliation provisions, a number of states have enacted generalized statutes protecting employees who report violations of any state laws,[4] while other states have incorporated anti-retaliation provisions into specific legislation.[5] Even laws that do not specifically contain anti-retaliation provisions, like Ohio's child abuse reporting statute, could be emasculated, if a biblical chain of command philosophy justifies the termination of an employee who reports suspected violations.

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[3]Asbestos School Hazard Detection and Control Act, 20 U.S.C. § 3608; Davis-Bacon Act, 40 U.S.C. 276a; Fair Labor Standards Act, 29 U.S.C. §§ 201-219; McNamara-O'Hara Service Contracts Act, 41 U.S.C. § 351-5; Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531; National Labor Relations Act, 40 U.S.C. § 327 *et seq.*; Safe Drinking Water Amendments of 1977, 42 U.S.C. § 300j-9; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610; Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*; Toxic Substances Act, 15 U.S.C. § 2622.

[4]California, Durings Calif. Codes, Labor Code § 1102.05(a) and (b); Connecticut Gen'l Stat. Annt. § 31-51m; Title 26 Revised Statutes of Maine § 831-840; § 570; § 628; Title 5 § 4572(1)(E); Mich. Compiled Laws § 15.361 *et seq.*; § 17. 428(1) *et seq.*; N.Y. Labor Laws § 740; Title 25 Okla. Stat. Annt. § 1601.

[5]In Ohio, in addition to the anti-retaliation provision in its civil rights laws, retaliation is prohibited in its equal pay law, Ohio Rev. Code § 4111.17, its minimum wage law, Ohio Rev. Code § 4111.13 and its workers compensation law, Ohio Rev. Code § 4123.90.

DCS argues that the State's interest is not seriously impaired because as the record now stands only one employee of one religious institution is affected by the "Good Report" policy. (DCS Br. at 29). DCS readily acknowledges, however, that the biblical chain of command philosophy is widely held among religious sects. (DCS Br. at 25). The likelihood of numerous claims for exemption is great, not only because of the prevalence of such philosophy, but also because any attempt to involve the State in any matter in such schools would be a violation of the biblical chain of command philosophy, and could justify the termination of an employee who contacted the State.

4. The State's interest cannot be negated by the conduct of private parties.

DCS would have this Court hold that the State can have no interest whenever the religious practice directly affects only persons who have submitted to the religious institution's authority. That argument is in conflict with the recent holdings in both *Lee* and *Bob Jones University*. The Amish employer in *Lee* employed only Amish laborers. Bob Jones University's racially discriminatory policies affected only its students who shared the school's religious beliefs. Thus, contrary to DCS' argument, the State's interest is not diminished or negated because Linda Hoskinson agreed by contract, or otherwise, to follow the biblical chain of command.

Statutory rights and civil obligations cannot be negated by agreement or contract. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241-242 (1978) ("One whose rights... are subject to state restriction, cannot remove them from the power of the State by making a contract about them."). The principle that statutory rights and obligations cannot be voided by consent or contract is particularly well-established in the area of civil rights legislation. In *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974), the Court held an employee's rights under the federal civil rights laws, 42 U.S.C. § 2000e, *et seq.*, are not susceptible of contractual waiver

because any such prospective waiver would defeat the paramount purpose of the Act. Similarly, the lower courts have recognized that neither an employer or union can claim that a union contract exempts them from the requirement that they reasonably accommodate individual religious needs of employees. *Nottelson v. Smith Steel Workers D.A.L.A. 19806,* 643 F.2d 445, 452 (7th Cir. 1981); *McDaniel v. Essex International,* 571 F.2d 338, 343 (6th Cir. 1978); *Yott v. North American Rockwell Corp.,* 602 F.2d 904 (9th Cir. 1979); *Cooper v. General Dynamics, Convair Aerospace Div.,* 533 F.2d 163 (5th Cir. 1976) certiorari denied *sub nom. International Association of Machinists and Aerospace Workers v. Hopkins,* 433 U.S. 908.

DCS argues that because Linda Hoskinson's actions were religiously dissident, the State may not intervene. Again, DCS attempts to portray this matter as a purely ecclesiastical dispute with no secular ramifications. Yet, there are important secular interests present both because of the educational setting and because Mrs. Hoskinson's actions were affirmatively protected by state law. The existence of religious differences in this employment dispute is not dispositive under these circumstances.

Adoption of DCS' argument that Mrs. Hoskinson's voluntary commitment to the biblical chain of command precludes consideration of the State's interest would effectively insulate the school from any application of equal employment laws. This result is not consistent even with DCS' own position in this case. DCS says that it does not contest the court of appeals' conclusion that the anti-discrimination statutes may be applied to religious institutions where religious belief is not implicated. (DCS Br. at 26). It also concedes the commission has jurisdiction to investigate a charge of discrimination at least to the extent of determining whether the institution is religious in nature and whether the institution is fraudulently claiming a religious tenet necessitates its actions. (DCS Br. 34, note 24). The State, of course, does not agree that these are the constitutional limits of its jurisdiction in this area. However, the State would not be able to make even this limited inquiry if the

biblical chain of command can be invoked as a protected religious basis for firing employees who question discriminatory practices. In essence, if a biblical chain of command policy gives affirmative constitutional protection to retaliatory conduct, the State is left with no effective means to investigate any claim of discrimination because no employee can safely question any decision of the employer.

D. DCS' Overbreadth Claim Is Improperly Raised And Unmeritorious.

DCS contends the provision of Ohio Rev. Code § 4112.02 (A) and (E) sweep too broadly, and are, therefore unconstitutional. DCS reaches this conclusion by claiming the commission, at some point in the future, could apply the employment discrimination laws to purely religious institutions. This overbreadth claim was rejected by the district court, (A-91), and was not addressed by the court of appeals, (A-4, note 5). It is not properly asserted in this Court because a finding that the statute is overbroad on its face would substantially enlarge the judgment below by declaring the entire act unconstitutional and DCS did not file a cross-appeal. *Federal Energy Admin. v. Algonquin SNG, Inc.,* 426 U.S. 548, 560, note 11 (1976); *Swarb v. Lennox,* 405 U.S. 191, 200-201 (1972); *Morley Const. Co. v. Maryland Casualty Co.,* 300 U.S. 185, 191 (1937). Appellant, nonetheless, will briefly address the merits of the overbreadth claim.

The standard applied to determine overbreadth claims is "whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside Hoffman Estates, Inc.,* 455 U.S. 489, 494 (1982). Even if there are marginal applications where the statute would infringe on First Amendment values, facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct. *U.S. Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973).

Measured against this standard, the Ohio civil rights laws cannot be considered facially invalid. The bulk of the schools' argument consists of a few hypothetical situations wherein DCS proposes the commission could assert its jurisdiction unconstitutionally. "It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, ____ (1984).

The overbreadth challenge fails not only because Appellees have not shown the statute reaches a substantial amount of constitutionally protected activity but also because the statute covers a whole range of constitutionally proscribable activities. The Act provides a mechanism for enforcing Ohio's compelling interest in the eradication of all forms of discrimination in secular employment, housing and credit. Additionally, the statute is validly applied to religious employers who discriminate against employees on the basis of race, sex, age, handicap and national origin. Finally, the schools cannot contest the State's valid interest in protecting employees against religious discrimination by secular employers.

Despite the schools' contention to the contrary, Section 4112.02(E)(5) specifically provides an employer with the option of requesting a bona fide occupational qualification to be applied in hiring situations. The statute does not limit the availability of the bfoq to any protected classification, and, therefore, permits the exemption to be used on religious grounds. Having never given the commission the opportunity to grant a bfoq, the school cannot argue the exemption would have been denied. Moreover, it certainly has no basis to argue that a bfoq exemption would not be granted in the hypothetical situations involving Yeshiva Academy and St. Mary's seminary. As previously discussed, the Constitution itself precludes State involvement in the examples of St. John's Church and Good Shepherd Convent. (DCS Br. at 35-36).

Based on the foregoing, the overbreadth challenge to Ohio's laws against discrimination must fail. DCS has failed to show any real or substantial risk of constitutional infringement, and has ignored the countless situations in which there can be no question the statute is validly applied. To find the Act overbroad would deprive Ohio of its ability to validly enforce its laws against discrimination and would work a substantial injustice to all citizens of Ohio.

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AMICUS CURIAE

BRIEF

No. 85-488 (6)

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,

Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC. *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS

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INTEREST OF THE AMICUS

The American Jewish Congress is an organization of American Jews founded in 1918, dedicated to the protection of the religious, political, civil and economic liberties of all Americans, but particularly those of American Jews. No liberty enjoyed by Americans is more important to American Jews than religious liberty. For this reason, the American Jewish Congress has filed many briefs in this Court in cases raising religious liberty issues.

This case, however, also raises issues concerning the enforcement of statutes outlawing invidious employment discrimination against women. The American Jewish Congress helped draft many of these statutes. It continues to urge their vigorous enforcement, so that women have the opportunity to fully use their talents, free of damaging sexual stereotypes.

Because AJCongress' organizational purposes include the promotion of both of the values which, in this case, are in conflict, its views may have particular relevance to this Court's deliberations.

This brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

1. Although this case was decided below in favor of appellees on both Establishment and Free Exercise grounds, only the latter should be invoked by this Court. Not only is there no excessive entanglement on this record, but the history and purposes of the Establishment Clause demonstrate that the Clause was aimed at governmental aid to religion, not efforts to regulate it. Moreover, deciding this case on free exercise grounds allows for a balancing of state interests against those of religious institutions, and would not entirely exempt religious institutions from anti-discrimination laws, as would an Establishment Clause decision in favor of appellees.

2. A. There is no question that appellees' refusal to renew Hoskinson's contract was religiously motivated. However, contrary to the assertion of the

appellants, coercion to abandon that religious practice is present here. Dayton Christian Schools' ("DCS") religious belief is not only that mothers of young children should not work; it is that its teachers are models of Christian piety.

Appellants are simply wrong when they suggest that DCS would not be coerced by Ohio Rev. Code Ann. §4112.02(A) to abandon that belief. A state may not compel a church school to hold up as a role model a person who, in the school's view, is unworthy of that high and sacred office.

Finally, since §4112.02(A) coerces DCS to abandon its religious principles, it is no business of the courts or the Ohio Civil Rights Commission to weigh the significance of that religious belief to DCS vis-a-vis the free exercise claim upheld in Wisconsin v. Yoder, 406 U.S. 205 (1972).

B. In order to demonstrate that it has a compelling interest sufficient to

override DCS' interest in putting into practice its religious beliefs, appellants must show more than the fact that the elimination of discrimination is important. Wisconsin v. Yoder, 406 U.S. 205 (1972) teaches that the state must show that it cannot accommodate the religious practice in question and substantially meet its secular objectives.

In this case, the state's interest is threefold: protecting the dignity of women, eliminating economic ghettoes, and uprooting sexual stereotypes. Hoskinson's dignity was no doubt offended by the refusal to renew her contract; however, that harm is no greater than the harm DCS' would suffer if it could not carry out its religious beliefs. DCS' refusal to employ mothers of young children does not effect any significant aspect of the economy, and would not create any risk of economic ghettoization.

Appellants place heavy emphasis on the need to banish sexual stereotypes. However, carving out a narrow exception for parochial school teachers would not substantially interfere with that interest. All but the smallest number of positions would remain covered by §4112.02(A). The American people understand and accept the fact that religious institutions must be permitted certain leeway not afforded other institutions in society. Students at DCS observe the impact of Ohio Rev. Code Ann. §4112.02(A) everywhere. Appellants concede that DCS remains free to teach its views on the role of women -- thus substantially undercutting the efficiency of the statute in eliminating sterotypes.

Exempting DCS would neither require an exemption for commercial businesses operated by persons with strong religious beliefs, nor result in a wave of litigation. Moreover, Bob Jones University

v. U.S., 461 U.S. 574 (1983) recognizes that, while religious institutions may not demand subsidies to practice invidious discrimination, they remain free to practice such discrimination at their own expense.

C. Without regard to compelling interest analysis, the right of a church school to select teachers is the functional equivalent of the right of a church to select a minister, a right this Court has held protected by the Free Exercise Clause. It is, moreover, a right which must be considered absolute, not subject to balancing. As the record demonstrates, DCS' teachers function like ministers.

3. The state does have a compelling interest in protecting all complainants against retaliation, even if they do not have meritorious claims. This is so even as to religious schools, which do not enjoy

unlimited exemption from the civil rights laws. Absent protection against retaliation, religious schools will, in effect, become judges of the viability of their own free exercise claims.

ARGUMENT

Introduction

Racial and sexual discrimination in employment, as a matter of both law and public perception, is abhorrent and inherently suspect. But as this Court has held, Roberts v. U.S. Jaycees, 104 S.Ct. 3244 (1984), some discrimination remains constitutionally protected in order to faciliate other constitutional values, including religious freedom, privacy and association.

Anti-discrimination laws are based on the rational view that individuals ought not be subject to adverse treatment because of immutable characteristics unrelated to job performance. Such laws pose

particularly difficult problems for religious institutions whose religious beliefs dictate discriminatory treatment.

The central question posed by this case is whether appellees' admittedly discriminatory acts, motivated by religious belief, fall within the narrow class of constitutionally protected discrimination, or whether they are to be condemned as just another instance of invidious discrimination.*

I

THIS CASE SHOULD BE DECIDED ON FREE EXERCISE GROUNDS

A. Either The Establishment Or Free Exercise Clauses Could Be Invoked to Decide This Case

The present case may be analyzed

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* In the District Court, appellants argued that the decision not to renew Hoskinson's contract was not religiously motivated. The District Court rejected this contention.

Appellents did not challenge this finding in the court below, Dayton Christian Schools v. Ohio Civ. Rts. Comm'n, 766 F.2d 932, 936,n.6, (6th Cir. 1985) and do not do so here.

either under the Free Exercise or Establishment Clause. The court below found for appellees under both clauses; appellees rely on both in this Court.

The inquiry under the Free Exercise Clause is straight-forward: is a practice religious, Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972); does the challenged government action interfere with it, Tony and Susan Alamo Foundation v. Secretary of Labor, 105 S.Ct. 1953 (1985); is the government's policy justified by a compelling interest which cannot otherwise be vindicated, Wisconsin v. Yoder, supra.

The Establishment Clause analysis inquires whether Ohio's civil rights law requires excessive governmental entanglement with the religious affairs of Dayton Christian Schools (hereafter "DCS"), Grand Rapids School Dist. v. Ball, 105 S.Ct.

3216 (1985); cf. NLRB v. Catholic Bishop, 440 U.S. 490 (1979).*

Which of the religion clauses applies here is not a matter of academic interest only. If the Establishment Clause is the appropriate ground, and appellees' claim of undue entanglement is upheld, government may not enforce any anti-discrimination law against any pervasively religious institution.

By contrast, vindication of appellees' claim under the Free Exercise Clause would leave room for some applications of anti-discrimination laws,

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* In NLRB v. Catholic Bishop, supra, this Court referred to the "Religion Clauses" or to the First Amendment, not to either of its component clauses. It avoided the constitutional question presented there by interpreting the federal labor statute as not applying to church schools, a course not open here. The courts below, which are presumably familiar with state law, Regents v. Ewing, 54 U.S.L.W. 4055,4058,n.10 (1985), however, found that the Ohio statute at issue in this case was intended to regulate the employment decisions of church schools.

since, at a minimum, exemption would depend on a showing that a discriminatory act was religiously motivated.

B. The Free Exercise Clause Is The Proper Ground For Decision

Religious institutions have a substantial interest in autonomy,* in structuring their activities in accordance with their religious teachings, and hence in not being subject to legal restraints

* Claims for autonomy have been frequently raised in the context of state regulation of parochial schools, see, e.g., State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976); City of Sumner v. First Baptist Church, 98 Wash. 2d 1, 639 P.2d 1358 (1982); Atty Gen. v. Bailey, ___ Mass. ___, 436 N.E.2d 139 (1982).

applicable to secular institutions.*

Cf. Regents v. Ewing, supra, 54 U.S.L.W. at 4058, n.12 (noting need for autonomy in college setting).

How much autonomy is necessary to preserve the independence of religious schools, how much is consistent with ordered liberty -- these are difficult questions,

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* Although the states have an interest in adjudicating disputes over the ownership of property, the constitutional command that government not intrude into church affairs limits judicial resolution of church property disputes, see, e.g., Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

In those cases, this Court has not identified which of the religion clauses is implicated, Ellman, Driven From The Tribunal: Judicial Resolution of Internal Church Disputes, 69 Cal. L. Rev. 1378 (1981). But, see, Laycock, Towards A General Theory of the Religion Clauses; The Case of Church Labor Relations and the Right to Church Autonomy, 81 Col. L. Rev. 1373, 1389 (1981) (treating cases as presenting free exercise issues) (hereafter Laycock, "Church Autonomy").

not susceptible of across the board answers, such as required by the Establishment Clause.

As a matter of textual interpretation, only the Free Exercise Clause is relevant here. Professor Laycock, Church Automony, supra, 81 Col.L. Rev.at 1381, argues persuasively that it is illogical to invoke the Establishment Clause where churches resist governmental regulation.*

The Establishment Clause's primary purpose, as shown by the history recited by this Court's opinion in Everson v. Bd. of Educ., 330 U.S. 1 (1947) or the very different understanding of Justice Rehnquist dissenting in Wallace v. Jaffree

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* Avoiding the Establishment Clause as a basis for decision also obviates the need to determine whether the duty of avoiding excessive entanglement outweighs a state's interest in enforcing its civil rights law. Balancing has not yet become a part of Establishment Clause jurisprudence, see Laycock, Church Autonomy, supra, 81 Col. L. Rev. at 1386, n.13, although it is at the heart of free exercise analysis.

105 S.Ct. 2479,2508 (1985), was to prohibit government from aiding religion.

The voluminous scholarly literature, while divided on the permissibility of non-discriminatory aid to religion, points in the same direction, see, Pfeffer, Church, State and Freedom (1967); Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1981); Cobb, The Rise of Religious Liberty in America: A History (1902); Berns, The First Amendment and the Future of American Democracy (1985). Rodger Williams who opposed establishment because of its impact on religion was concerned with the harm to individual conscience, not state regulation of the church, De Wolfe Howe, The Garden and The Wilderness (1965).

While it is true that this Court has described the Establishment Clause as invalidating governmental inhibition of religion, see, e.g., PEARL v. Nyquist, 413

U.S. 756,773,(1973), that understanding of the Clause, which entered this Court's cases without explanation, is simply not supported by its history as recited by this Court, or as described in the scholarly literature.*

To be sure, in establishing one faith, or several, the state "inhibits" excluded faiths, but the principal constitutional violation in such cases is the aid to the favored group. That other faiths are inhibited is, perhaps, inevitable, and a sufficient policy reason to ban established churches, but it is not a fact necessary to

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* In Tony and Susan Alamo Foundation v. Secretary of Labor, supra, this Court considered an Establishment Clause challenge to the Fair Labor Standards Act. The brief of the United States, #83-1935, at p. 43, n.23, observed that the Establishment Clause was of dubious relevance in that case. Given the ease with which this Court dispensed with the merits of the entanglement argument in that case, it is not surprising that it did not consider the argument of the United States.

prove a constitutional violation.

The issue in this case is not whether government aids religion by enforcing an anti-discrimination statute. Rather, it is whether government is interfering with religion by doing so. It strains the English language to label such interference an establishment of (or aid to) religion. If government regulation of religion interferes with any right of church institutions, it is a right protected by the Free Exercise Clause.

Finally, Establishment Clause analysis would focus on the likelihood of entanglement by appellants in the affairs of DCS. There is here no realistic likelihood of such entanglement. Not all entanglement is impermissible -- only that which is excessive is proscribed, Tony and Susan

Alamo Foundation v. Secretary of Labor, supra; PEARL v. Regan, 444 U.S. 646 (1980).

The issue in this case is narrow: whether two discrete acts, subject of a complaint by the individual involved,* may be the subject of enforcement proceedings by appellants. At this stage in the proceedings, the facts are not in doubt, nor is the religious nature of the acts in question. No question of remedies, by which appellants might seek to supervise the daily activities of DCS, is now before this Court. In short, there is no excessive entanglement on this record.

This Court's experience -- indeed, that of society generally -- with reconciling institutional autonomy and comprehensive regulatory schemes is limited. A broad pronouncement under the Establish-

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* This case presents no issue of whether appellants may on their own initiative investigate the hiring practices of religious institutions.

ment Clause governing the applicability of civil rights statutes to pervasively secretarian institutions would likely have a chilling effect on the development of reasonable responses to this clash of values. For this reason, this case should be decided on the narrowest possible ground -- the Free Exercise Clause, see, Regents v. Ewing, supra, 54 U.S.L.W. at 4057.

II

APPELLANTS CANNOT, CONSISTENT WITH THE FREE EXERCISE CLAUSE, PROHIBIT DCS FROM DISCRIMINATING ON THE BASIS OF SEX IN THE HIRING OF TEACHERS

A. All The Elements Of A Free Exercise Clause Claim Are Present Here

Distinctions between believers and non-believers, the saved and the damned, those in a state of grace, and those not, priests and laity, are integral aspects of most religions. The Fourteenth Amendment's guarantee of equal protection bars the states from making such irrational distinctions among its citizens. Religion, by contrast, enjoys constitutional

protection, in making these very distinctions.

Of course, while the freedom to believe is "absolute", the "freedom to act" on religious beliefs is not "absolute", but is "subject to regulation for the protection of society," Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

The Ohio Civil Rights Commission (hereafter "OCRC") nevertheless goes too far in seeking to prohibit a church-school from implementing religious views on the role of women in the selection of teachers who will educate and minister to the students.

As already noted, p.8, supra, the inquiry in free exercise cases is straight-

forward.* The first element of that inquiry -- that a religious practice be involved -- is satisfied here, see p.7, supra.

The second element -- coercion -- is also present. What, if not to force appellees to act in a manner "fundamental(ly) at odds with the [its] fundamental tenets of their religious beliefs" (that teachers must be models of Christian piety) is this case about?

Appellants, quoting the District Court, deny the existence of coercion:

> [N]one of the parents, teachers, or administrators at Dayton Christian Schools would themselves be forced to engage in conduct violative of their religious beliefs were the proscriptions against sex discrimination in employment ... brought to bear on Dayton Christian Schools. Those who believe the Bible requires the mother to be at home

* That it is here a church-school, not an individual, raising a free exercise claim is irrelevant, Tony and Susan Alamo Foundation v. Secretary of Labor, supra; cf. Roberts v. U.S. Jaycees supra; Serbian Eastern Orthodox Diocese v. Milivojevich, supra.

> remain free to stay at home. The students' potential exposure in the classroom to a single poor exemplar of these beliefs hardly compares to placing an Amish child in a modern consolidated school remote from and alien to his daily home life.
>
> [Juris. Statement at 16]

The Court of Appeals correctly rejected this reasoning, which is based on a three part error -- it: misconceives the extent to which the Constitution protects the free exercise of religion; misapprehends the role of the teacher at DCS; improperly casts the courts in the role of judges of the relative importance of particular religious practices to different faiths.

1. Direct and Impermissible (coercion Is Present

As to the issue of coercion, appellants ignore the teachings of Yoder and Sherbert v. Verner, 374 U.S. 398 (1963) that governmental action short of a direct ban on religious activity can violate the Free

Exercise Clause.*

2. Appellants Misconceive The Role of Teachers at DCS

Appellants' suggestion that the relief they seek would only expose students to a "single poor exemplar" entirely ignores the special role of teachers at DCS. Teachers at DCS are not only imparters of knowledge, whose individual state of grace is not a matter of urgent concern to school administrators and students; rather they are to be personal embodiments of the Christian faith. The District Court itself found that: (578 F.Supp. at 1004)

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* It is no answer that DCS could continue to refuse to allow Hoskinson to teach, but pay her what she would otherwise earn. First, Ohio Rev.Code Ann. §4112.02(A) authorizes courts to enjoin illegal discrimination. Moreover, as Sherbert, supra, and Thomas v. Rev. Bd., 450 U.S. 707 (1981) teach, the Free Exercise Clause stands as a bar to governmentally imposed charges for the privilege of religious exercise. But see, Braunfeld v. Brown, 366 U.S. 599 (1961). A continuing duty to pay Hoskinson for work not performed is no less a financial penalty than the denial of unemployment benefits because an applicant turns down Sabbath work.

> teachers at DCS are selected because of their ability to blend their religious beliefs into every lesson and school activity. Teachers are required to be born again Christians and to carry with them into their classes the religious fervor ... necessary to stimulate young minds into accepting Christ as savior ... [Hence] the school demands that teachers conform both in thought and conduct to the tenets and principles felt essential to leading a Christian life.

See also 766 F.2d at 949, n.29.

Application of Ohio Rev. Code Ann. §4112.02(A) to DCS does not merely compel DCS to expose its students to "a single poor exemplar". If this case involved a janitor, that argument might carry substantial weight. But this case involves a teacher selected precisely because of her religious convictions and actions, and whose convictions and actions are to serve as models for her students to emulate.

Apellants seek to compel DCS to set up as a role model of proper Christian living a person it regards as unworthy of that high and sacred office. A more

intrusive action on the part of the state is difficult to imagine.

Further, although this case involves only one teacher, if the school is required by the anti-discrimination law this year to maintain on its staff one "poor exemplar" of its views on the role of mothers of young children, there would be no principled, non-discriminatory, way to assure that many more such "poor exemplars" not be hired or retained on the staff at any one time in the years to come.

Even the District Court was troubled by the fact that the Ohio's anti-discrimination statute on it face bars a church from refusing to hire a minister of a different denomination, or DCS from refusing to hire a Catholic or a Jew, or a fallen born-again Christian, 578 F.Supp. at 1021. As far as the interference with DCS' beliefs are concerned, the result is the same in this case as in those hypotheticals.

The Free Exercise Clause does not suggest a difference between religious discrimination (which appellants will tolerate) and sex discrimination (which they will not tolerate). Nor do appellants explain why eliminating sex discrimination is more important than eliminating religious discrimination.

3. It Is Not The Role Of The Judiciary to Weigh The Significance To DCS Of Its Beliefs

The third fallacy in appellants' argument is that they arrogate to themselves the right to determine the degree to which requiring DCS to hire Hoskinson would interfere with its religious principles. Appellants compare such compulsion unfavorably with the coercive effects of Wisconsin's compulsory education law on the Amish. It is, however,

> not within ... the judicial competence to inquire whether [appellees] correctly perceived the commands of their faith. Courts are not arbiters of scriptural interpretation.

Thomas v. Rev. Bd., supra, 454 U.S. at 716. No more are they empowered to set themselves up as judges of the significance of a religious practice in order to determine whether it is sufficiently important to implicate the Free Exercise Clause.

B. The Appellants Have Not Demonstrated A Compelling Interest

Once it is established that appellees' sincerely held religious beliefs conflict with a state policy, the state must demonstrate that its policy advances a compelling interest, and that no narrower means would vindicate that interest.

The Court of Appeals, 766 F.2d at 953, held that appellants had failed to meet this burden, finding that it could pursue its interest in non-discrimination by other means, as by denying schools which practice

religious discrimination tax exemption and other forms of financial assistance, see Bob Jones University v. U.S., 461 U.S. 574 (1983).

There is an inherent conceptual difficulty with compelling interest analysis in free exercise cases, even though in this case the court below correctly evaluated appellants' asserted compelling interests. The Bill of Rights was designed to place certain rights beyond the reach of shifting electoral majorities, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624,638 (1943). If asserted compelling state interests, as determined by legislative majorities, are not carefully and strictly scrutinized, compelling interest analysis would allow those majorities to destroy the free exercise of religion.

If compelling interest analysis is not to swallow up constitutional liberties whole, a court applying such analysis must look beyond the mere fact that a state has a policy, or even that a policy is labelled

by it "compelling." The inquiry, rather, must be whether carving out an exception to the general rule would entirely defeat an important and valid state goal*.

Thus, an educated citizenry was undoubtedly an important state goal, one of the most basic duties of state government. Yet the undoubted importance of that goal

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* Justice Stevens' position in U.S. v. Lee, 455 U.S. 252,262,n.3 (1982) that the Free Exercise Clause does not compel exemption from laws of general applicability was based on the Establishment Clauses' proscription against favoring one religion over another. Not only does this reading entirely exalt the Establishment over the Free Exercise Clause -- not a self-evident result, Pfeffer, The Supremacy of Free Exercise, 61 Georgetown L. Rev. 1115 (1973) -- but it ignores the fact that not carving out an exemption under the Free Exercise Clause is equally likely to favor one religion over another.

Churches which believe that it distorts Biblical teaching to relegate women to positions of inferiority will seek an anti-discrimination law with no exceptions for religiously based sex discrimination. If successful, they are free to practice their beliefs but churches holding an opposite belief are not. Such a law would not establish religion, but would hardly be neutral.

was, in Yoder, found insufficient to outweigh the Amish's free exercise interest because, as applied to that group, the state's interest was insufficiently weighty.

By contrast, in U.S. v. Lee, supra, this Court held that Congress need not make the payment of employer taxes to the Social Security system voluntary, to the extent of excusing those who, like the Amish, hold religious objections to the Social Security system. A tax scheme which is voluntary is not a tax system.*

The state has multiple interests in abolishing sex discrimination in private employment: to protect the dignity and

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* Similarly, because of the way communicable diseases spread, a system of voluntary inoculation is not as effective as compulsory vaccination against smallpox, Jacobson v. Mass., 197 U.S. 11 (1905). Moreover, cases in which the physical well-being of children are at issue present a more compelling case for state intervention, since the child is unable to decide for itself its own best interest, Prince v. Mass., 321 U.S. 158 (1944).

welfare of the individual woman who is the victim of sex discrimination; to insure that women as a class are not relegated to an economic ghetto; to affect the attitudes of society generally, so that stereotypical and prejudicial views towards the more than half of the population that is female are eradicated.

It cannot be denied that Hoskinson has suffered economic harm in not having her contract renewed, and that her dignity as a human being has also suffered. However, DCS is not the only school in which Hoskinson can teach. Upholding DCS' right to discriminate against Hoskinson would seal off only a miniscule portion of the economy to a relatively small, constantly changing, class of evangelical woman.*

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* The appellants' appear to concede that DCS is entitled to hire only an evangelical teacher. [Juris. Statement at 14]

If it is appellants' claim that, because of her sex, she is denied the opportunity to teach in a school whose fundamentalist religious beliefs she largely shares, the state's interest is quite weak, for it would be seeking to take sides in a dispute over church doctrine.

As to Hoskinson's loss of dignity, there is no a priori difference between that loss and the harm to DCS if it is compelled to violate its basic beliefs about the correct ordering of society.

The third interest casts appellants in the role of educator, as communicators of ideas. Ohio has outlawed sex discrimination in employment not only because such conduct is harmful in and of itself, but because such discrimination communicates an idea about the worth of women as individuals. Ohio's

anti-discrimination statute represents an effort on the part of the state to change attitudes, see, generally, M. G. Yudoff, When Government Speaks (1983).

Appellants place heavy emphasis on this educational purpose [Juris. Statement at 17-18], arguing that DCS' policy of relegating women with young children to the home perpetuates the very sterotype the state seeks to eradicate. Quoting EEOC v. Mississippi College, 626 F.2d 477, 489 (5th Cir. 1980), appellants argue "[DCS'] discriminatory attitudes will be perpetuated with an influential segment of society, the detrimental effect of which cannot be estimated".

Appellants' asserted educational purpose, centerpiece of the District Court's

judgment in their favor, 578 F. Supp. at 1035-36, cannot be accorded significant weight. The very existence of an anti-sex discrimination statute, enforced against all but a handful of employers, conveys the desired message about the wrongfulness of sexual stereotyping. For the state to achieve its educational purpose, it is simply not necessary to outlaw every stereotypical judgment. Application of the statute against DCS is designed not so much to communicate the idea that sexual stereotypes are wrong as it is to supress DCS' very different idea about the role of women.

An ordinary employer may not resist application of Ohio's anti-sex discrimination law on the ground that enforcement of the law against it unnecessary to advance the state's goal; that is a matter for legislative judgment. The Free Exercise Clause, however, demands that appellants prove that the marginal

increase in efficiency which would result by enforcing Ohio Rev. Code Ann. §4112.02(A) against DCS would further a compelling state interest. As the Court of Appeals found, 766 F.2d at 954-56, appellants have not met that burden.

Moreover, anti-sex discrimination laws can help change attitudes, even where it does not, in terms, apply . Thus, over the last two decades, roughly corresponding to the enactment of employment discrimination laws, religious groups have substantially changed their attitudes toward women.* None of the changes noted in the margin was compelled by law, but each is surely not unrelated to the passage of these statutes. It is, therefore, incorrect to argue that exempting DCS from coverage of

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* Proscriptions against the ordination of women have fallen in numerous denominations, and are under challenge in others. The liturgy of various churches has been revised to eliminate "sexist" references. The text of the Bible itself has not been immune from this process.

the anti-discrimination law means that the state is communicating nothing on the subject of the roles of women to those attending DCS.

Of course, conferring a limited exemption on DCS means that its students will have a different view of the role of women than they would if the statute were applied. However, appellants' appear to concede that DCS may express its views on the proper role of women to its students, [Juris. Statement at 18] and, by seeking to hire only committed Christians, minimize the number of instances in which women with young children will serve as teachers (Id. at 14,n.7). These concessions substantially undercut appellants' claim that they have a compelling interest in requiring DCS to retain Hoskinson in its employ.

Moreover, students at DCS do not live in a vacuum, wholly isolated from the world around them. The message of equality

implicit in Ohio Rev. Code Ann. §4112.02(A) is evident in stores, public and private employment, on radio and television -- in short, practically everywhere. Its non-enforcement in DCS (as to teachers) cannot insulate students from the message the state seeks to communicate.*

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* It is also not without significance that it is a religious institution seeking exemption. Americans understand that it is part of the nation's constitutional heritage to tolerate varying religious practices. The impact of a religious exception for DCS on the state's policy against sex discrimination is thus greatly attenuated, see Wallace v. Jaffree, supra, 104, S.Ct. at 2503-04 (O'Connor, J., concurring). For this reason, too, there is no merit to appellant's claim [Juris. Statement at 22-3] that exempting DCS will establish religion.

C. Exempting DCS Will Not Lead to A Flood Of Claims For Exemption

The District Court found that recognizing an exemption for DCS would lead to claims of exemption by religious persons operating commercial enterprises, 578 F.Supp. at 1036. This was error, for, as Justice O'Conner observed in Roberts v. U.S. Jaycees, supra, 104 S.Ct. at 3258, "a shopkeeper has no constitutional right to deal only with persons of one sex." Neither does a commercial employer have a right to hire persons of one sex, anymore than a religious employer engaged in commercial activities is exempt from minimum wage laws, Tony and Susan Alamo Foundation v. Secretary of Labor, supra, 105 S.Ct.at 1964.

The courts uniformly reject free exercise claims made in support of discrimination by commercial employers. Thus, in a free exercise case in the context

of purely commercial employment, Minnesota v. Sports and Health Club, Inc., 370 N.W.2d 901 (Minn. 1985), petition for cert. pending, #85-532, the Minnesota Supreme Court properly rejected a broad claim for exemption from that state's prohibition on religious discrimination made by the operator of a commercial establishment. Accord, King's Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C.Cir), cert. denied, 419 U.S. 996 (1974); Amos v. Church of Jesus Christ, 594 F.Supp. 791 (D. Utah 1984).

It simply defies every day experience to contend, as appellants do, that "the cumulative impact [of the Court of Appeals' holding] is likely to significantly impair the state's goal of eradicating discrimination." [Juris. Statement at 18]

Appellants suggest that, if forced to recognize an exception for DCS, they will be forced to deal with a substantial number

of similar claims. While there are a handful of cases* raising issues analagous to those presented here (although not every such case finds a meritorious free exercise claim), those cases (or statutes creating religious exemptions) have not in any significant way impeded the elimination of invidious racial or sexual discrimination.

Finally, Bob Jones University v. U.S., supra, establishes no general rule

* Rayburn v. General Conference, 772 F.2d 1164 (4th Cir. 1985); EEOC v. Pacific Press Publishing Co., 676 F.2d. 1272 (9th Cir. 1982) EEOC v. Southwestern Theological Seminary, 651 F.2d 277 (5th Cir. 1981); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981); McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972); Dolter v. Wahlert H.S., 483 F.Supp. 266 (N.D. Iowa 1982); Feldstein v. Christian Science Monitor, 555 F.Supp. 974 (D. Mass. 1983); Whitney v. Greater N.Y. Corp., 401 F.Supp. 1363 (S.D.N.Y. 1975) Madsen v. Erwin, 395 Mass. 715, 481 N.E. 2d 1160 (1985); Minn. v. Sports and Health Club, supra; Walker v. First Presbyterian Church, 22 F.E.P. 762 (Cal. Super. Ct. 1980); Lewis ex rel Murphy v. Buchanan, 21 F.E.P. 696 (Minn. Dist. Ct. 1979).

that anti-discrimination statutes must always overcome free exercise claims. This Court there held only that the federal government had a compelling interest in refusing to subsidize racial discrimination. Indeed, the Court was careful to observe, 103 S.Ct. at 2035:

> Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.

See also Runyon v. McCrary, 427 U.S. 160, 167,n.6 (1976).

D. A Religious School Has An Absolute Right To Select Those Who Will Teach Religion

The analysis employed until now has followed the classic compelling interest model of free exercise analysis laid down in Sherbert v. Verner, supra. There is, however, a different mode of free exercise analysis applicable in this case which

requires an affirmance as to the substantive sex discrimination claim.

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952), holds that "freedom to select the clergy ... must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." Because the selection of ministers inevitably effects what the church will believe, it, like the right to believe, must be absolute, Cantwell v. Connecticut, supra. Accordingly, courts have simply refused to apply the prohibition of Title VII and like statutes to the employment of ministers.*

A teacher in DCS is functionally, if not in name, a minister. It is the job of each teacher to expose his or her charges

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* See, Rayburn v. General Conference, supra; EEOC v. Southwestern Theological Seminary, supra; McClure v. Salvation Army, supra; cf. Dolter v. Wahlert H.S., supra; Walker v. First Presbyterian Church, supra.

to the teachings of the church. It is the further obligation of each of DCS' teachers to integrate the sacred and the secular, to forge them into a unified whole.*

These views are not idiosyncratic. Lemon v. Kurtzman, 403 U.S. 602 (1971), this Court's first holding that direct financial subsidies for religious schools were unconstitutional, noted that the religious role of the teacher was a defining characteristic of the parochial school and was one of the reasons that state aid to

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* DCS' purpose (which it terms a 'ministry') "is to provide a quality educational program that is based upon the Word of G-d," 578 F.Supp. at 1009. The program "is an extension of the local evangelical fundamental church's Christian education program" for "there can't be any differentiation between secular and sacred, [because] God himself is the center of all aspects of learning ... " Id. at 1010.

such schools was impermissible.

It would be odd constitutional doctrine that protected the right of religious schools to exist, Pierce v. Society of Sisters, 268 U.S. 510 (1925), barred such schools from obtaining state subsidies because they provided a religious atmosphere by the choice of suitably religious teachers, Lemon v. Kurtzman, supra, but which also permitted the state to require that DCS hire any qualified teacher, regardless of his or her religious status,* Accord, Bagni, Discrimination In The Name Of The Lord: A Critical Evaluation Of Discrimination By Religious Organizations, 79 Col.L.Rev. 1514 (1979).

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* This Court has summarily upheld teacher certification rules against challenges by church schools that they interfered with their right to select teachers see, e.g., State v. Faith Baptist Church, 207 Neb. 802, 301 N.W.2d 571, app. dismissed, 454 U.S. 803 (1981).

Those cases are not controlling here. None involved a certification standard which compelled teachers to adhere to views in conflict with a tenet of the school.

Because appellants seek to control DCS in its choice of ministers, their actions violate the Free Exercise Clause.

III

THE FREE EXERCISE CLAUSE DOES NOT ALLOW DCS TO RETALIATE AGAINST EMPLOYEES WHO FILE DISCRIMINATION COMPLAINTS

Anti-retaliation statutes, such as Ohio Rev. Code Ann. §4112.02(I), protect those who believe that they have been the victims of discrimination, and who file good faith complaints with the appropriate authorities.*

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* An employee may be the victim of unlawful retaliation even where an employer did not, originally, illegally, discriminate see, e.g., Love v. Re/Max of America, Inc., 738 F.2d 383 (10th Cir. 1984); McCabe v. Johnson County, 5 Kan. App.2d 232, 615 P.2d 780 (1980). There are no reported Ohio cases.

As applied to a religious institution which may enjoy substantive immunity from the discrimination laws, anti-retaliation statutes further the compelling governmental interest of allowing government to determine whether it may exercise adjudicatory authority in a particular case.

Absent such statutes, religious institutions would be sole judges of their own cases. Only they could determine whether they were legitimately entitled to invoke the Free Exercise Clause as a defense to a particular claim of discrimination. As argued in Points I and II, it is not the case that religious schools enjoy blanket

immunity from anti-discrimination laws. A state must be able to receive complaints from the employees of religious institutions to determine whether they are engaged in illegal (and unprotected) discrimination. Such complaints will not often be filed if the state cannot outlaw retaliation.

Appellees' attempt to avoid this analysis by insisting that their religious belief in the "Biblical chain of command" forbids Christians to file complaints about church activity with secular authorities. Nevertheless, the state's interest in preventing retaliation against those whose file complaints is sufficiently compelling to outweigh appellees religious beliefs.

The "Biblical Chain of Command" could be used to object to neutral and compelling forms of government oversight of church schools -- from attendance health

reports,* and fire safety violations** to reports of child abuse.*** Appellees' claim that the state may not properly protect those who question the policies of a religious school is a radical one, wholly inconsistent with the rule of law and ordered liberty, Wisconsin v. Yoder, supra.

That the state has an interest in receiving complaints from church-school employees does not delineate what the state may do to vindicate those claims. It simply allows the state, subject to judicial review, to determine whether or not a

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* Attorney General v. Bailey, Mass. , 436 N.E.2d 139 (1982).

** Cf. Faith Assembly v. State Building Code Comm'n, Mass. , 416 N.E.2d 228 (1981)

*** Cf. Candy H. v. Redemption Ranch, Inc., 563 F. Supp. 505 (M.D. Ala. 1983); State v. Corpus Christi People's Baptist Church, 683 S.W. 2d 692 (1984), app. dismissed for want of substantial federal question, ___U.S. __ (1985).

valid free exercise or other constitutional objection exists to its superintendence of a religious institution.*

CONCLUSION

For the reasons stated, the judgment should be affirmed in part and reversed in part.

Respectfully submitted,

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December 26, 1985

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* It could be argued that the Biblical Chain of Command is an exhaustion of remedies requirement. The state's interest in short-circuiting a church's internal processes is far less compelling than its interest in insuring access vel non. Requiring exhaustion of internal church procedures might be an acceptible means of minimizing church/state conflict, cf. Walz v. Tax Comm'n, 397 U.S. 664 (1970). In this case, however, there is no suggestion that exhaustion of internal mechanisms would have led to any different result or that the Biblical Chain of Command is an exhaustion of remedies requirement.

AMICUS CURIAE

BRIEF

No. 85-488

Supreme Court, U.S.
FILED
DEC 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,

Appellants,

—v.—

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE WOMEN'S LEGAL DEFENSE FUND, *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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Interest of Amici Curiae[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of more than 250,000 members dedicated to protecting fundamental rights, including both the right to the free exercise of religious observance and the right to equal treatment under the law. The ACLU has participated in many cases before this Court involving the Religion Clauses and has simultaneously sought vigorous enforcement of state and federal non-discrimination law.

The Women's Legal Defense Fund is a non-profit, tax exempt membership organization founded in 1971 to provide pro bono legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to

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[1] The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, and agency advocacy before the Equal Employment Opportunity Commission and other federal agencies charged with enforcement of the equal opportunity laws.

Amici believe that the opinion of the Sixth Circuit below misapplies important precedents of this Court, subverts legislative intent, and unduly hampers aggrieved individuals seeking to enforce non-discrimination law and principles. In contrast to the approach of the court below, we do not believe that respect for First Amendment principles necessitates or justifies the broad-based exemption for religiously-affiliated schools from the operation of all discrimination laws and procedures that is sought by respondent here.

Statement of the Case

Between 1974 and 1979, Linda Hoskinson taught Fourth and Sixth grades at the Dayton Christian Schools ("DCS"), an inter-denominational fundamentalist Christian School.[2] DCS is incorporated and is operated by a Board of Directors, its "governing body," which alone is authorized to hire, fire, set religious policy, supervise daily operations and resolve internal disputes.[3]

During her tenure as a DCS teacher, Hoskinson satisfied all DCS' criteria for employment. In 1978, she became pregnant. She discussed her pregnancy and her desire to continue teaching with Jim Rakestraw, the principal of the elementary school, in early 1979, and he indicated that "probably . . .

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[2] 578 F.Supp at 1008-09.

[3] Transcript of Proceedings in the district court, Dec. 8, 1980 (hereafter "Tr.") at 83-85, 143-44.

there would be no problem."[4] Rakestraw then discussed the matter with the school superintendent, Claude Schindler, who instructed Rakestraw not to renew Hoskinson's contract for the following year. Schindler's decision emanated from a "desire to have a mother home with pre-school age children."[5] Pursuant to these instructions, Rakestraw wrote to Hoskinson that, ". . . as you will be a new parent (June) your teaching next year would be in contrast to the School's philosophy. As a school, we see the importance of the mother in the home during the early years of child growth."[6]

Hoskinson and her husband consulted a lawyer to determine whether the non-renewal of her teaching contract on the stated

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[4] Id. at 123.

[5] Id. at 67.

[6] Joint Appendix (hereafter "J.A.") at 70 (memorandum dated Feb. 20, 1979, from Rakestraw to Hoskinson).

grounds was lawful. When school officials received a letter from her lawyer stating his opinion that the action was discriminatory, Hoskinson was suspended from her job.[7] Shortly thereafter, DCS' Board of Directors decided to terminate Hoskinson's employment because of her failure to follow a doctrine called the Biblical "chain of command" which required that DCS employees resolve all disputes with the school through internal procedures, under which the Board of Directors had final authority.[8] Pursuant to the Board's instructions, Schindler immediately terminated Hoskinson's employment.[9] He also simultaneously rescinded the prior letter regarding the non-renewal of her

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[7] See J.A. at 71-72 (letter dated March 6, 1979, from Robert T. Dunlevey, Jr. to Schindler) and J.A. at 128 (Final Pretrial Order, uncontested facts).

[8] Tr. at 53,68.

[9] J.A. at 74-75 (letter dated March 27, 1979, from Schindler to Hoskinson).

contract,[10] writing, in pertinent part, that

> Dayton Christian Schools, Inc., has not changed its policy concerning the need for pre-school children to be in the home and to receive direct love and guidance from Christian parents. However, we have concluded that this is an area that has not been carefully studied and documented. It is our intention to diligently and prayerfully search the Scriptures for guidance in this area. After this has been accomplished, we will be better prepared to formulate school policy in this area.[11]

The next day Hoskinson filed a charge of employment discrimination with the Ohio Civil Rights Commission ("OCRC"), and requested that it be filed with the Equal Employment Opportunity Commission ("EEOC"), as well.[12] The OCRC notified DCS of the charge, undertook a preliminary investigation, issued a

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[10] Tr. at 69,140.

[11] Letter dated March 27, 1979, from Schindler to Hoskinson, Defendant's Exhibit C, quoted at 578 F. Supp. at 1030.

[12] J.A. at 76-77. The provision for filing with both agencies is standard practice pursuant to work-sharing agreements between the EEOC and state "deferral" agencies. See 42 U.S.C. §§2000e-5(c) and e-8(b).

determination of "probable cause" to believe that discrimination had occurred, attempted conciliation, and scheduled a public hearing - all standard procedures in the processing of an employment discrimination charge.[13]

Prior to the hearing, DCS filed a complaint[14] in the federal district court for the Southern District of Ohio seeking to enjoin the OCRC from processing Hoskinson's discrimination charge on the grounds that OCRC's actions violated DCS' rights under both the free exercise and establishment clauses of the First Amendment. DCS alleged that the very exercise of jurisdiction by OCRC infringed its First Amendment rights, and that even if OCRC could exercise

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[13] See J.A. at 78-99 for documents reflecting and describing the regulatory process.

[14] Joined as plaintiffs were Schindler, two churches, two parents of DCS students, one of whom was also a DCS Board member, and a DCS teacher, all of whom are referred to collectively herein as "DCS."

jurisdiction over some discrimination claims against DCS, it could not, consistent with the Constitution, prohibit the acts of which Hoskinson complained.

In denying the requested relief, the district court made the following findings of fact, which are not challenged on appeal: that DCS is a pervasively religious school;[15] that Schindler acted on the basis of his own sincerely-held religious beliefs when he initially decided not to renew Hoskinson's contract because of her approaching motherhood, although the "school's philosophy" on this point was not "specifically delineated"; [16] that the Biblical "chain of command" is part of the basic religious philosophy of DCS;[17] and that the DCS Board terminated

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[15] 578 F. Supp. at 1010.

[16] Id. at 1012, and see 1030.

[17] Id. at 1010-11.

Hoskinson for her failure to follow the Biblical "chain of command."[18]

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[18] Id. at 1013.

Summary of Argument

Our society cherishes its diversity of religious faiths and strives to accommodate their many manifestations. The separation of church and state mandated by the establishment clause of the First Amendment itself enables diversity to exist and flourish. It is thus profoundly important to the exercise of religious freedoms that government maintain the strictest neutrality in its dealings with religious institutions.

Secular government necessarily interacts with religious bodies on many levels and in many contexts, sometimes unavoidably intruding on deeply and centrally held beliefs. Reynolds v. United States, 98 U.S. 244 (1879); United States v. Lee, 455 U.S. 252 (1982). The more encompassing the nature of the religion, the more likely and frequent these conflicts with secular authority will be, and the more difficult it becomes for the

state to create exceptions to facially neutral rules that do not operate in practice as religious preferences. Braunfeld v. Brown, 366 U.S. 599 (1961) King's Garden, Inc. v. Federal Communications Commission, 498 F.2d 51, 55-56 (D.C.Cir.), cert. denied, 419 U.S. 996 (1974).

This case involves a pervasively religious school whose tenets extend far beyond the classroom. Among its requirements for example, is that all of its staff, including janitorial and kitchen staff, adhere to the school's statement of faith.[19] More significantly, the religious doctrine establishing a Biblical "chain of command" explicitly acknowledges as legitimate only religious authority over all matters

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[19] Tr. at 76. See also Tr. at 32 ("there can be no separation between secular and sacred"); and at 114 (scripture used as authority "in deciding who I was going to vote for [and] how I am going to spend my money...").

concerning the school's operation.

While there is no doubt that adherents are fully entitled to a belief in the exclusive legitimacy of religious authority, the implications of this contention beyond the private sphere of worship are profound: DCS contends that the OCRC may not even investigate a charge of discrimination, because the very act of asserting state jurisdiction necessary to conduct such an investigation violates its rights under the First Amendment.[20] Thus, because of the pervasive nature of DCS' philosophy, its argument, if accepted, would effectively insulate DCS from all secular power. By claiming an absolute entitlement to enforce its Biblical "chain of command," DCS in effect asserts the right to be entirely self-policing, an entitlement which would

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20 J.A. at 103,¶3; 118-20, and 127.

presumably apply in other regulatory contexts as well.[21]

The First Amendment, however, does not authorize religiously-affiliated organizations to decide unilaterally that their activities shall be exempt from government regulation. In this, as in other closely analogous situations, it is the province of the courts, not of unreviewable church-related bodies, to determine "what the law is." Marbury v. Madison, 5 U.S. 137 (1803). See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (jurisdiction of courts, not executive, to assess validity of claim of executive privilege). Moreover, the rule

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21 The Biblical "chain of command" would arguably preclude an employee from complaining of health and safety violations, minimum wage violations, tax violations, and the like, matters all clearly within the proper purview of regulatory agencies, notwithstanding the free exercise clause. See Tony & Susan Alamo Foundation v. Secretary of Labor, ___ U.S. ___, 85 L.Ed.2d 278, 105 S.Ct. 1953 (1985), United States v. Lee, 455 U.S. 252.

which DCS seeks here would contravene the establishment clause, by improperly delegating the authority of the state to church officials. See Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1983). If a religious school could so easily insulate itself from state administrative consideration of its claim for an exemption, there would be no disincentive to making such claims and a multitude of similar cost-free requests for exceptions to the coverage of various statutes and regulations would ensue. See United States v. Lee, 455 U.S. 252, Reynolds v. United States, 98 U.S. 244. Acceptance of DCS' position would thus impermissibly entangle the government in an unacceptably high number of judgments regarding interpretation of religious doctrine, the sincerity of beliefs and the centrality of doctrine to faith. See Bob Jones University v. United States, 461 U.S.

574, 604 n.30 (1983); United States v. Lee, 455 U.S. at 263 n.2 (Stevens, J., concurring).

The Sixth Circuit's wide-ranging discussion, resulting in an order barring OCRC from investigating Hoskinson's sex discrimination and retaliation charges, appears to rest on two distinct grounds. On the one hand, the Court of Appeals held that the very assertion of investigative authority over DCS (presumably no matter what the charge) violated the school's free exercise rights and resulted in impermissible church-state entanglement. We address this plainly erroneous theory in Point I. The court below also apparently concluded that, regardless of the investigative authority that may in general be asserted over religious schools in civil rights cases, the First Amendment nonetheless would have barred investigation of both of the specific discrimination claims

at issue here: 1) the retaliatory termination, for failure to follow a Biblical "chain of command," of a teacher who filed an employment discrimination charge, and 2) the school's decision to refuse to employ the mothers (but not fathers) of young children. In Points II and III, infra, we address these two issues.[22]

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[22] The Court of Appeals addressed these two issues because the district court, having implicitly found in favor of OCRC on the question of jurisdiction, proceeded to determine whether the specific acts which were the focus of Hoskinson's charge should enjoy First Amendment protection.

ARGUMENT

I.

THE STATE ALWAYS HAS AUTHORITY TO INQUIRE WHETHER ASSERTED FIRST AMENDMENT INTERESTS DESERVE EXEMPTION FROM FACIALLY NEUTRAL GOVERNMENTAL POLICIES

A. The Sixth Circuit ruling at issue here, to the extent that it generally denies the OCRC all "jurisdiction" to consider possible employment discrimination at Dayton Christian Schools, is based on a fundamental misperception of the relationship between free exercise claims and the state's authority. Although free exercise considerations must indeed inform all government interactions with religious organizations, it is flagrantly overbroad and erroneous to say, as the Sixth Circuit did, that the state lacks the right even to inquire whether a claimed religiously-based exemption is constitutionally justified. The assertion of a free exercise claim as a basis for exemption from

an otherwise applicable, neutral state policy does not end, but only begins, the relevant First Amendment inquiry. See Cantwell v. Connecticut, 310 U.S. 296 (1940).

Contrary to the Sixth Circuit's apparent belief, inquiring into the constitutional propriety of granting such exemptions is not suspect under the free exercise clause; it is the essence of free exercise jurisprudence. Despite DCS' present contentions, government legitimately, indeed routinely, scrutinizes claims for religion-based exemptions arising from a myriad of circumstances. See, e.g., Bob Jones University v. United States, 461 U.S. 574 (tax exemption for discriminatory private school); Wisconsin v. Yoder, 406 U.S. 205 (1972) (claim for exemption from compulsory high school attendance); Sherbert v. Verner, 374 U.S. 398 (1963) (exemption claim relating to unemployment compensation law requiring claimant to be available to

work on Saturday); Welsh v. United States, 398 U.S. 333 (1965) (conscientious objector claim); Tony and Susan Alamo Foundation v. Secretary of Labor, ___U.S. ___, 85 L.Ed.2d 278, 105 S.Ct. 1953 (1985) (exemption from Fair Labor Standards Act); People v. Woody; 394 P.2d 813 (Cal. 1964) (exemption from state ban on the use of peyote). In such cases, when free exercise objections to facially neutral state requirements are advanced, courts necessarily inquire into, and make judgments concerning, the basis of the First Amendment claims of those seeking exemption, and the competing governmental and private interests. Nor has the Court ever found it objectionable that the initial factual determinations in many, if not most, free exercise cases were made, or in the future would be made, by administrative agencies, rather than by courts. See Thomas v. Review Board, Indiana Employment Security

Division, 450 U.S.707 (1981) and Sherbert v. Verner, 374 U.S. 398 (unemployment boards); Seeger v. United States, 380 U.S. 163 (1965) (local draft board).

This case is no different. There is no suggestion, even by DCS, that the state goal at issue here -- eliminating discrimination in employment -- is anything other than purely secular in purpose, or that the OCRC is proceeding other than in good faith. The Ohio statute is obviously neutral on its face, and both courts below found that the state legislature intended to create no general exemption for schools that are religiously oriented or controlled.[23] Federal

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[23] Contrary to the Sixth Circuit's apparent assumption, there is no suggestion anywhere in this record that the Ohio legislature, courts or the OCRC are not fully conversant with the requirements of the First Amendment. Nor is there any suggestion that the OCRC would not be able to effectuate its statutory mandate in a manner fully consistent with legitimate First Amendment interests. Since the OCRC's procedures were interrupted, the record is insufficient to support the conclusion that it would (footnote cont'd)

anti-discrimination law, while exempting a narrow class of employment decisions relating to religious organizations, see pp. 25-29, infra, also plainly applies here.

Thus, despite DCS' claim that the mere fact of its religious orientation should automatically shield its employment actions from secular review, the well-established constitutional rule is otherwise. In assessing religion-based claims for exemption from otherwise applicable state policy, this Court's free exercise clause jurisprudence requires consideration of three factors: (1) the impact of the state's policy upon the exercise of religious belief; (2) the magnitude of the state's interest justifying the burden that would be imposed; and (3) the extent to which exemption from the statute for the claimants, and all those likely to be

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not strike an appropriate balance. See King's Garden Inc., v. Federal Communications Commission, 498 F.2d at 60.

claimants, would impede the objectives sought to be advanced by the state. United States v. Lee, 455 U.S. 252; Wisconsin v. Yoder, 406 U.S. 205; Sherbert v. Verner, 374 U.S. 398. And far from automatically granting religious exemptions, the Court has carefully weighed and analyzed the competing factors, reaching different results even as to the same religion depending upon the magnitude of the particular burden that would be imposed on the claimant, as compared to the countervailing importance of the particular state goal. Compare Wisconsin v. Yoder, 406 U.S. 205 with United States v. Lee, 455 U.S. 252.

The fact that the particular free exercise claim at issue here preemptively and automatically denies the legitimacy of state authority -- for the essence of the "chain of command" notion is to preclude the exercise of all state jurisdiction -- does not in any

way alter the applicable constitutional analysis. A religious objection to a neutral state policy cannot, simply because of the way it is framed, operate so as unilaterally to deprive the state of its otherwise legitimate power to enforce its secular laws. At most, therefore, DCS' reliance on the "chain of command" doctrine as a justification for Hoskinson's termination merely shifts the focus of the state's legitimate inquiry to the "chain of command" rule, and to the state's countervailing interest in preventing retaliation for the filing of discrimination claims. It does not, and constitutionally cannot, unilaterally abort the constitutional inquiry before it even starts.

To be sure, free exercise claims deserve -- and enjoy -- great deference in our law. But the mere assertion of such a claim has never been enough to take the claims -- and, more importantly, the actions sought to be

justified by them -- outside the jurisdiction of the law itself. Determinations of the scope of the law's applicability as against claims of religious and other constitutionally-based privileges have always been made by agencies and ultimately by courts, and not by those whose practices are at issue. See Wisconsin v. Yoder, 406 U.S. 205; United States v. Lee, 455 U.S. 252. If the rule of law is to prevail in a society devoted to "ordered liberty," Wisconsin v. Yoder, 406 U.S. at 215, entitlement to even constitutionally-based privileges and exemptions must be subject to review. See, e.g.., United States v. Nixon, 418 U.S. 683 (judicial assessment of executive privilege); Kastigar v. United States, 406 U.S. 441 (1972) (judicial assessment of self-incrimination privilege); United States v. Gravel, 408 U.S. 606 (1972) (speech or debate privilege); NAACP v. Alabama, 357 U.S. 449 (1958)

(associational rights).

B. The Court of Appeals was wrong not only in its conclusions concerning the general propriety of administrative evaluation of a claimed free exercise exemption; it was also specifically wrong in concluding that such inquiries are impermissible in enforcement of anti-discrimination laws. Analogous cases arising under the federal anti-discrimination law, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended ("Title VII"), illustrate well the relative ease with which the constitutional parameters in this area can be, and have been, drawn.

Title VII contains only a limited statutory exemption permitting the hiring of

co-religionists,[24] which has been narrowly construed.[25] In this way, Congress and the lower courts have been able to advance the compelling interest in equal opportunity without unduly trenching upon the performance of religious tasks or impermissibly intruding

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[24] Title VII contains an explicit exemption for discrimination in favor of co-religionists, 42 U.S.C. §2000 e-1, e-2(e)(2), and the lower federal courts have uniformly applied a further exception for jobs involving the performance of ministerial functions. See McClure v. Salvation Army, 460 F.2d 553 (5th Cir.) cert. denied, 409 U.S. 896 (1972). Although Ohio law on its face contains no similar limitations, it is plain that in this case neither exception would apply. Hoskinson satisfied the religious criteria for employment, and teachers, notwithstanding any importance they may have as role models, do not perform the job of minister. EEOC v. Mississippi College, 626 F.2d 477, 485 (5th Cir. 1980) cert. denied, 453 U.S. 912 (1981). Moreover, cases decided pursuant to Title VII are relevant here not merely by analogy: as one of the coordinate local enforcement agencies contemplated by Title VII, part of the OCRC's task is precisely to enforce that law. As noted above, the discrimination charges at issue here were expressly based upon Title VII as well as on Ohio law.

[25] As the District of Columbia Court of Appeals has found, a broader exemption for religiously-affiliated employers would conflict with the establishment clause. King's Garden, Inc. v. Federal Communications Commission, 498 F.2d at 55-57.

into ecclesiastical disputes and governance. Compare Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (First Amendment prohibits intervention in determining church doctrine or internal church authority structure).

The Ninth and Fifth Circuits have, in particular, made clear that exemptions from the compelling governmental interests articulated in anti-discrimination laws must be carefully limited to those instances in which the effect on religious freedoms will be direct and profound. Noting that "a college is not a church," EEOC v. Mississippi College, 626 F.2d 477, 485 (5th Cir.1980) cert. denied, 453 U.S. 912 (1981), the Fifth Circuit had little difficulty concluding that an exemption of church employees responsible for "ministerial" functions from charges of discrimination based on religion did not extend to teachers at a religious college:

> [the fact] that faculty members are expected to serve as examples of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern.

626 F.2d at 485. Similarly, in EEOC v. Pacific Press, 676 F.2d 1272 (9th Cir.1982), the Ninth Circuit easily concluded that employees of religiously-owned enterprises were covered by Title VII. Compare Tony and Susan Alamo Foundation v. Secretary of Labor, ___ U.S. ___, 85 L.Ed.2d 278, 105 S.Ct. 1953. And in EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir.1981), cert. denied, 456 U.S. 905 (1982), the court carefully distinguished between those employed by a seminary who performed "minister-like" functions and those (such as support and administrative staff) who did not. Indeed, the court found no First Amendment obstacle to requiring a church seminary to comply with relevant Title

VII data compilation and reporting requirements for non-ministerial positions, even though the seminary had a demonstrated preference for having ordained ministers perform such functions.

C. In the Title VII cases cited above, and in the district court below, the courts have emphasized not only the absence of free exercise objections to the assumption of jurisdiction, but also the absence of any establishment clause obstacle to the limited involvement in religious affairs that the exercise of EEOC "jurisdiction" ordinarily entails. Each court concluded that, despite the fact that applying Title VII in such contexts requires some church-state contact, there was no excessive entanglement involved in the record-keeping[26] and single-incident

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[26] This Court has only recently held that similar or greater record-keeping and reporting requirements of (footnote cont'd)

investigations that are the most Title VII enforcement ordinarily requires.[27]

Indeed, upholding a blanket, unexamined exemption of DCS and similar schools from governmental jurisdiction over employment discrimination charges would be much more likely to violate the establishment clause than would the neutral application of anti-discrimination laws, for doing so would mean "automatically" denying the validity of

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the Fair Labor Standards Act do not generate undue church-state entanglement. Tony and Susan Alamo Foundation v. Secretary of Labor, ___ U.S. ___, 85 L.Ed.2d 278, 105 S.Ct. 1953.

27 The Court of Appeals stated that OCRC "attempted to coerce" DCS into conciliation, 766 F.2d at 951, and relied heaviily in its analysis on the potential for "intrusive" remedies such as reinstatement. E.g., id. at 943. The record makes clear, however, that the proposed conciliation agreement was simply a standard form, the particulars of which were open to negotiation, see J.A. at 85, and that it therefore had no "coercive" effect whatever. Both the OCRC and the EEOC are required to attempt resolution of disputes "by informal methods of conference, conciliation, and persuasion." See J.A. at 92-93 and 42 U.S.C. §2000e-5(b). But conciliation is voluntary, by definition. The Court of Appeals' concern regarding remedies was premature and speculative, at best. See n. 28, infra.

competing secular claims, see Estate of Thornton v. Caldor, Inc., ___ U.S. ___, 86 L.Ed. 2d 557, 105 S.Ct. 2914 (1985), and ceding governmental decision-making authority to religious organizations. See Larkin v. Grendel's Den Inc., 459 U.S. 116.

Although the Court has acknowledged the abstract possibility that inquiries arising in the course of enforcing asserted state jurisdiction "may" impinge on First Amendment rights, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979), it has never suggested that state jurisdiction cannot be invoked to inquire whether jurisdiction may be asserted.[28] Cf. Wheeler v. Barrera, 417

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28 NLRB v. Catholic Bishop is entirely distinguishable on statutory grounds. The Court's decision in Catholic Bishop that the NLRB could not intervene in Catholic school affairs was grounded on the fact that Congress had not expressly authorized such action, but the Court did not hold that the NLRB violated the Bishop's free exercise rights by asserting jurisdiction. In contrast, the statutes at issue here clearly were intended to reach the employment practices of religiously-affiliated organizations, (footnote cont'd)

U.S. 462 (1974) (resolution of First Amendment challenge requires specific factual context). The Sixth Circuit has not found the remedy to be too extreme -- nor could it, for no remedy had been imposed (and indeed only a preliminary finding of discrimination had even been made). Rather, it held that free exercise was violated merely by making the constitutionally relevant inquiry. In doing so, it went much further than this Court, or other courts, ever have in "automatically" ceding what may legitimately still be Caesar's to an individual's assertion that it actually is God's. Cf. Estate of Thornton v. Caldor, Inc., ___ U.S. ___, 86 L.Ed.2d 557, 105 S.Ct. 2914.

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with only limited exceptions. Moreover, the concern expressed in Catholic Bishop regarding the NLRB's remedial powers is inapposite here. The issue in this case is the authority to investigate a single complaint, not to issue any particular remedy. That question is, of course, far too premature for judicial resolution. Cf. Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961).

Asserting OCRC "jurisdiction" here is only to assert the right to inquire whether relevant First Amendment tests are satisfied.

II.

RETALIATION AGAINST AN EMPLOYEE FOR FILING A CIVIL RIGHTS COMPLAINT IS NOT, AND CANNOT BE, ACTION CONSTITUTIONALLY PROTECTED BY THE FIRST AMENDMENT

Unquestionably, the action to which DCS admits in this case -- the retaliatory termination of a long-standing employee simply because she consulted a lawyer, who then threatened to file discrimination charges -- would be in flagrant violation of state and federal civil rights law if it had occurred in any other context. 42 U.S.C. §2000e-3(a); Ohio Rev.Code §4112.02(1). Indeed, the right to be free from retaliation in response to the assertion of civil rights is essential to the effective enforcement of our civil rights and anti-discrimination

laws. As the Fifth Circuit Court of Appeals has noted,

> Title VII would be chilled to a freeze by allowing the icy finger of job discharge or refusal to touch an individual who claims his Title VII rights. The resort to legal rights cannot itself legalize discrimination.

East v. Romine, Inc., 518 F.2d 332, 342 (5th Cir. 1975). And this Court has expressly recognized that, in such cases, the private litigant not only redresses his or her own injury, but also "vindicates the important congressional policy against discriminatory employment practices." Alexander v. Gardner-Denver, Co., 415 U.S. 36, 45 (1974). See also Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

Consequently, this case presents a stark conflict between the state's fundamental interest in enforcing civil rights laws[29] and

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[29] Although framed here in terms of sex discrimination, precisely the same questions could arise regarding race (or other forms of)
(footnote cont'd)

DCS' asserted religious interest in barring its employees from seeking the assistance of secular authority in pressing civil rights claims. For purposes of analysis, we accept as true Hoskinson's claim that she was initially discriminated against on the basis of sex and that Ohio law constitutionally could and did prohibit such discrimination. The question then becomes whether DCS could nevertheless fire her for violating its religiously-based rule precluding her attempt to vindicate those rights.

The "chain of command" rule, no matter how sincere and religiously-based, cannot justify Hoskinson's dismissal in the face of state (and national) policy prohibiting retaliation against those who press claims of unlawful discrimination. The state's policy is of overriding significance, and its

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discrimination. See, e.g., Bob Jones University v. United States, 461 U.S. 574.

implementation without exceptions is essential to the accomplishment of the state's objectives. Thomas v. Review Board, Indiana Board of Employment Security, 450 U.S. 707; United States v. Lee, 455 U.S. 252.

Non-retaliation provisions provide essential safeguards for the underlying substantive rights they protect; those rights will be gravely jeopardized unless complainants seeking their vindication are assured that no adverse effects will flow from their complaints. The state's interest in non-retaliation thus mirrors its general interest in non-discrimination, an interest recently described as "fundamental," "overriding" and "compelling." Bob Jones University v. United States, 461 U.S. at, 604 (race discrimination in education); See also Palmore v. Sidoti ___ U.S. ___ , 80 L.Ed 2d. 421, 104 S. Ct. 1879 (1984). Discrimination

"violates deeply and widely accepted views of elementary justice." Bob Jones University v. United States, 461 U.S. at 592. This is no less true of sex discrimination than race discrimination. This Court has frequently recognized the "compelling interest in eradicating discrimination against its female citizens," an interest it has held to be "of the highest order." Roberts v. United States Jaycees, 468 U.S. ___, ___, 82 L.Ed. 2d 462,475, 104 S.Ct. 3244, 3253 (1984). See also Mississippi University for Women v. Hogan, 458 U.S. 718, 723-26 (1982), Hishon v. King & Spalding, ___ U.S. ___, 81 L.Ed. 2d 59, 104 S.Ct. 2229 (1984).

The magnitude of the interest sought to be advanced by non-retaliation provisions, combined with the fact that the exemption sought by DCS has been[30] and is likely to be

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30 See, e.g., cases cited by the district court, 578 F.Supp. at 1036-37, in which religiously-affiliated (footnote cont'd)

sought by others, compels the conclusion that religious employers simply may not with impunity fire employees who complain of discriminatory acts. Here, as in United States v. Lee, 455 U.S. 252, the likelihood of numerous claims for exemption is great, since such claims are cost-free to the employer, who has nothing to lose and everything to gain. This case is, therefore, unlike those cases which entail some personal cost for the part seeking exemption, providing a disincentive and natural check on the likely number of claimants and, more importantly, on fraudulent claims. E.g., Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707 (exemption only available to those who leave employment for religious reasons), Wisconsin v. Yoder, 406 U.S. 205 (criminal penalties invoked if

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employers have sought exemptions from fair employment laws.

claimed exemption denied). Here, in contrast, an employer may easily claim that religious beliefs compel the termination of any employee who complains (about anything) to (any) secular authority, with little disadvantage if the claim is denied, but with virtually complete insulation from secular authority if the exemption is granted. This case is thus similar to United States v. Lee, 455 U.S. 252, and Braunfeld v. Brown, 366 U.S. 599, where the Court foresaw the likelihood of a multiplicity of claims for exemption, both genuine and not, which would fatally undermine the ability of the state to accomplish its compelling purpose.

Thus, the state has a compelling interest in ending discrimination in employment and in pursuing without exception a non-retaliation rule as a vital part of its civil rights enforcement program. Moreover, infringement of the "chain of command" rule

in Hoskinson's case would itself impose no moral burden on DCS or its staff to act in a manner inconsistent with their own beliefs,[31] for this is not a case where an individual is being called upon to violate his or her deeply held beliefs. Compare Sherbert v. Verner, 374 U.S. 398. This Court has sanctioned much greater burdens on religious exercise where necessary to safeguard state interests that were similar in magnitude to those involved here. United States v. Lee, 455 U.S. 252 (criminal penalties for failure to pay social security tax); Reynolds v. United States, 98 U.S. 244 (proscriptions against plural marriage). The intrusion on DCS' religious activities here is surely much less since, at most, it must refrain from illegal secular retribution against one of

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31 As the Ninth Circuit noted in EEOC v. Pacific Press, 676 F.2d 1272, the church can always impose religious sanctions if its members violate significant tenets of the faith.

its own. Neither the OCRC nor the courts could protect Ms. Hoskinson against genuine ecclesiastical retaliation. But when the sanctions taken involve patent violation of the anti-retaliatory provisions of employment discrimination laws, it is equally clear that they can.[32]

In sum, the state's interest in non-retaliation principles as a necessary element of anti-discrimination law, coupled with the imperative that courts, not individuals or groups, must be the final arbiters of First Amendment claims, requires categorical

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32 The Court of Appeals found that less restrictive alternatives, such as denial of state-funded transportation or tax exemptions to discriminatory schools, would further the state's interests as well, 766 F.2d at 955, but this conclusion is unwarranted, and plainly offers no solution to the present problem. These remedies may indeed be less restrictive, but they are also less effective, denying redress to individuals injured by discriminatory acts. In addition, in this case such remedies would fail altogether to advance the state's interest in non-retaliation and the integrity of its civil rights scheme.

rejection of the asserted religiously-based right to retaliate. This Court has made clear that certain important state policies, some of them less "compelling" than the ones at issue here, outweigh free exercise claims. See Prince v. Massachusetts, 321 U.S. 158 (1954) (child labor laws); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (public health); United States v. Lee, 455 U.S. 252 (social security tax). And if this is so in principle, then the government must be equally entitled to enforce such laws effectively in practice, too.

At its simplest, then, if the government may require fire extinguishers in church schools, it may bar those schools from firing the janitor who reports a faulty fire extinguisher to the fire department.[33]

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[33] This example is not far-fetched: DCS requires all staff, including building service personnel, to subscribe to all tenets of faith. See n. 19, supra, and accompanying text.

III.

DCS HAS FAILED TO ESTABLISH AN ENTITLEMENT TO FIRST AMENDMENT PROTECTION FOR THE DECISION NOT TO EMPLOY THE MOTHER OF A PRESCHOOL AGE CHILD

A party seeking the protection of the First Amendment must in the first instance demonstrate, as a matter of fact, "that there is a conflict between the [particular] faith and the obligations imposed by the [statute]." United States v. Lee, 455 U.S. at 257. In this case, DCS seeks to exempt from the reach of both state and federal anti-discrimination law the patently discriminatory initial decision[34] not to renew Hoskinson's contract, but has offered no evidence whatsoever to support the claim that this decision flowed from, or was compelled by, any religious beliefs of the school. Instead, the record establishes clearly that

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[34] See Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971).

the decision was Superintendent Schindler's alone,[35] and that he was not authorized to make such a decision.[36] Moreover, the record is equally clear that, at the time Hoskinson was fired, the school as an entity had no policy prohibiting the employment of mothers of young children -- as evidenced both by Rakestraw's willingness to continue Hoskinson's employment and by Schindler's own written admission, pursuant to Board instructions, that:

> this is an area that has not been carefully studied and documented. It is our intention to diligently and prayerfully search the Scriptures for guidance in this area. After this has been accomplished, we will be better prepared to formulate school policy.[37]

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[35] Tr. at 143-44.

[36] Id. Schindler's testimony that he knew what the Board's decision was likely to be does not alter this fact.

[37] Letter dated March 27, 1979, from Schindler to Hoskinson, Defendant's Exhibit C, quoted at 578 F. Supp. at 1030. (Emphasis added.)

While it may well have been the school's preference not to hire women with small children,[38] this record is totally devoid of any evidence tending to show that DCS had a religiously-based policy prohibiting their employment.[39]

For two reasons, Schindler's own beliefs, however sincere, simply do not suffice to exempt DCS from the operation of fair employment laws. First, as a factual matter, Schindler was not authorized to set religious policy for the school and, under DCS' own structure, his views do not

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[38] Schindler's testimony that on one prior occasion he was counselled against hiring such a person, whom he had recommended, Tr. at 144-45, may suggest such a preference but fails altogether to establish either school policy or the missing religious rationale.

[39] Schindler testified that after Hoskinson was fired the school formulated policy in this regard, but the particulars of that policy are nowhere described. Tr. at 140. In any event, any such policy, having been developed after the events at issue in this case, could not provide, post hoc, the missing rationale for Schindler's earlier, unauthorized actions.

necessarily represent the school's and cannot be assumed to do so. Second, and more fundamentally, while Schindler's personal religious beliefs would be the touchstone in a case presenting a conflict between those beliefs and statutory requirements pertaining to him personally, see, e.g., Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707, United States v. Lee, 455 U.S. 252, the conflict here is between DCS, as an institution and employer, and the demands of federal and state employment discrimination laws. It is thus incumbent upon DCS to demonstrate the ways in which compliance with those laws would interfere with the ability of the school to observe or further its religious philosophy.[40]

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[40] The fact that there are parties to this suit other than DCS does not affect this analysis or its conclusions. The declaratory and injunctive relief sought pertains solely to DCS as "a religious institution." J.A. at 120 (emphasis added). Moreover, DCS did not elicit any testimony from any (footnote cont'd)

This is not to say either that individual religious views are not entitled to equal deference with institutional views, or that institutions may not represent the views of their members,[41] or that an institution could not delegate the power to enunciate religious policy to a superintendent or any other official. Nor does this imply that religious views need to be embodied in any formal statement or institutionalized in any way in order to enjoy First Amendment protection. Those questions are not posed here, nor is any question as to the sincerity or centrality of any religious tenet held by either Schindler or DCS. The point is simply

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party-witness indicating any personal stake in the outcome of this issue.

[41] It is not clear how the school would have done that in this case. There apparently was disagreement between Schindler and the Hoskinsons, and perhaps Rakestraw and others, regarding the nature of religious demands on working mothers. It is not unusual that different members of a sect disagree on religious doctrine. See p. 49, infra.

that if DCS wants exemption from its institutional responsibilities, it must demonstrate its entitlement as an institution. Schindler's personal religious beliefs simply do not suffice for this purpose.

The decisions of this Court show clearly that both individuals and religious institutions (as collective associations of individuals with their own structures and decision-making processes) have free exercise rights, and, as a consequence, that when a religious institution or organization itself seeks exemption from statutory obligations, it must do so by invoking some institutional religious conviction.

In cases where individuals seek the protection of the free exercise clause, reference to organizational beliefs is unnecessary, since failure to follow the tenets of organized religion does not imply that an individual's beliefs are any less

religious or sincere or central to that individual's spiritual life. Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. at 715-16. This approach, however, would be unworkable and illogical in the present situation, precisely because of the fact that adherents do not always concur on doctrinal matters.[42] To give controlling effect to an individual church member's religious beliefs, without a showing that they are representative of organizational doctrine, would be simply to prefer that interpretation, possibly at the expense of others.[43] The right of an organization to be

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42 Thus, this Court has noted: "Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. at 715.

43 As this Court has held in an analogous context: "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has (footnote cont'd)

exempt from statutory obligations cannot rest on so flimsy and potentially transitory a basis.

Because the record in this case so plainly fails to support any claim for a religious exemption for DCS to refuse to employ the mothers of small children, it is unnecessary and premature to decide whether the asserted religious interest in such a policy would override the state's compelling interest in non-discrimination.[44] See Bob Jones University v. United States, 461 U.S. 574. Such a decision would only be appropriate in the context of a factual record demonstrating, inter alia, the precise nature

important interests." Wisconsin v. Yoder, 406 U.S. at 215-16.

[44] In fact, the record is even insufficient with regard to the existence of such a policy, since DCS' decision not to renew Hoskinson's contract was rescinded upon her termination. See Tr. at 69, 140. Arguably, questions regarding the initial decision not to renew Hoskinson's contract became moot upon the termination of her employment and the rescission of the earlier contract renewal decision.

of the religious belief, its significance to the religious institution, and the extent to which the policy had been uniformly applied or waived. The balancing of interests required in First Amendment analysis makes the development of such a factual record essential to the proper disposition of these claims. Wheeler v. Barrera, 417 U.S. 462. The absence of such facts compels judgment for OCRC.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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BRIEF

Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL, JR.

No. 85-488

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-488

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants

v.

DAYTON CHRISTIAN SCHOOLS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICUS

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civic education, youth activities, and communications. When permitted by court rules and

practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States, particularly when the Religion Clauses of the Constitution are implicated.

In this case, this Court should reject the efforts of the Ohio Civil Rights Commission (hereafter "OCRC") to utilize the state's broad anti-discrimination laws to override the religious tenets of the Dayton Christian Schools which underlie this controversy relating to the employment of a teacher. This employee assumed her position as a believer and practicing member of the faith community embodied in Dayton Christian Schools, fully aware of the nature of the institution and embracing its employment philosophy. The instant controversy grew out of her refusal to comply with doctrinal interpretations made by Dayton Christian Schools. The court of appeals below correctly understood that the unjustified intrusion of secular authority into this kind of religious controversy violated rights guaranteed by the Free Exercise Clause. Its judgment should be affirmed on this ground.

The parties have argued, and the court below also ruled, that OCRC's assertion of authority "excessively entangled" the state in religion in violation of the Establishment Clause. Such an argument is merely a recast of "free exercise" principles and blurs the authentic purpose and function of the Establishment Clause. This Court should consider whether "excessive entanglement" should be so used and, on such consideration, abandon it as a separate part of its Establishment Clause doctrine.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

The efforts of government to regulate actions of churches grounded in religious beliefs directly implicate the freedom of religion protected by the Religion

Clauses.[1] In controversies such as this, advocates on both sides of the issue employ every available analytical tool. In particular, to avert the imposition of state regulation, the advocates of religious freedom seek support in both the Free Exercise and the Establishment Clauses, relying upon some decisions by this Court. The resulting contest unfortunately often tends to blur the authentic and distinct meaning of each Clause. This phenomenon is repeated in this case, as demonstrated by the opinion of the court of appeals and the contentions of the parties which unnecessarily thrust the Establishment Clause into the course of analysis. It is submitted, with respect, that this Court should make clear that, in cases such as this, judicial review should be confined to the Free Exercise Clause and cases decided thereunder.

The underlying dispute in this case involves the application of religious doctrine by the Dayton Christian Schools (hereafter "Christian School") to one of its teachers, a pregnant woman. Christian School required that each teacher be a born-again Christian and evaluated each prospective teacher by the degree to which the person could live according to an established code of conduct. Deviation in any manner from this code would be grounds for rejection, or after hiring, for termination. Christian School first decided not to hire the teacher for the coming school year, a decision rooted in a religious belief grounded in Scripture, namely, that mothers should be at home to rear their young children. When the teacher disagreed and sought legal counsel to enforce her "rights" under Ohio law, Christian School discharged her because she violated a fundamental religious belief of Christian School that its faithful should resolve disputes among themselves, in accord with established norms. It expressly so stated in its employment contracts; at the time she signed hers, the teacher expressly

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[1] The Religion Clauses of the first amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercises thereof . . . ."

agreed. This lawsuit centers around disagreements over religious views among members of the same faith community. At the teacher's behest, OCRC found that Christian School violated Ohio's anti-discrimination laws, and directed that Christian School rehire the teacher and agree not to make its employment decisions based on an employee's religion (among other things). Such a suggestion was anathema to Christian School, and thus it filed this lawsuit to challenge OCRC regulation.

The Free Exercise Clause protects a person's right to believe, practice, teach and proselytize. *McDaniel v. Paty*, 435 U.S. 618 (1978). The "full and free right" to believe encompasses a person's right to associate freely with those of similar outlook, to form voluntary institutions and churches for the furtherance and nurturing of those views, and to consent to be bound by such ecclesiastical association in all matters of faith, morals and practice. *Watson v. Jones*, 80 U.S. (13 Wall.) 728-29 (1872). "[I]t would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Id.* at 729. The constitution has "freed such institutions from the interference of the civil courts." *Id.* Whether such institutions conduct their religious affairs by processes and doctrines approved by the secular world is generally irrelevant. It is the nature of such institutions that decisions on interpretations of doctrine are accepted as matters of faith by their members, whether or not acceptable by secular criteria. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714 (1976).

This Court has stated that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas v. Collins*, 323 U.S. 516, 530 (1945), *quoted in*, *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). Where the underlying dispute does not raise a "substantial threat to public safety, peace or order

(*id.* at 403)," there is no basis for allowing secular interference. In a number of cases, this Court has examined when the imposition of state control over religious practices is justified. They fall into two categories: cases involving a threat to someone's life or health [*e.g.*, *Prince v. Massachusetts*, 321 U.S. 158 (1944)] and cases involving the prospect of direct harm to the public peace or order [*e.g.*, *United States v. Lee*, 455 U.S. 252 (1982)]. *Wisconsin v. Yoder* illustrates the limits on state authority when neither type of interest is threatened. 406 U.S. 205, 217-18, 229-30 (1972). *Yoder* controls here. OCRC seeks to extend this Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983) to justify its regulatory encroachment into a doctrinal dispute. Appellants' Br. at 30, 31. However, *Bob Jones University* did not involve imposition of regulatory control, but a public policy which declines to extend a public benefit (tax exemption) to a racially discriminatory institution. In this case, OCRC seeks to prohibit Christian School from applying its religious tenets for governing the employment of christians in the school.

Here, the court of appeals properly concluded that interests protected by the Free Exercise Clause were "affirmatively and coercively burden[ed]." *Dayton Christian Schools v. Ohio Civil Rights Commission*, 766 F.2d 932, 952 (6th Cir.), *jurisdiction postponed*, 106 S.Ct. 379 (1985) (No. 85-488). Like Wisconsin's interest in compulsory education in *Yoder*, Ohio's interest does not warrant overriding Free Exercise rights absent a "substantial threat" to life, health, public peace or order. *Wisconsin v. Yoder*, *supra*. If Christian School's religious beliefs offend Ohio law, the resulting civil disadvantage is to one person—a member of the faith community who, by her consent, bound herself to the decisions of the community.[2] Every aspect of Christian School, especially its

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[2] This *amicus* stands squarely against wrongful discrimination against anyone because of race, sex, national origin, age, or alienage. *E.g.*, U.S. Catholic Conference (Administrative Board) Statement,

teaching mission, was dictated by reference to the Bible. As a member of that community, the teacher was not justified in seeking the intervention of OCRC into her religious dispute. The assertion of secular authority into a dispute that was unquestionably religious violated the Free Exercise Clause. Ohio's effort to insinuate itself into that religious dispute must be rejected.

Ohio's assertion of regulatory authority over Christian School does not, despite the holding below, also infringe the Establishment Clause. This Court has demanded that the Establishment Clause be construed "according to what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). History teaches that the Clause was intended to deny to the new national government the authority to prefer any religion over others. The Clause buttresses the Free Exercise protections for religious liberty by denying to the government a specific way in which history had taught religious freedom may be infringed. *Wisconsin v. Yoder*, 406 U.S. at 214; *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). Excessive state interference in religious matters that tends to burden liberty impairs freedom of belief and practice. Such interference is indeed "excessive entanglement" as that term has been used, but the principle served is that embodied in the Free Exercise Clause. Although the Clauses were intended to be construed harmoniously to preserve and protect religious liberty, the tendency to implicate the Establishment Clause in cases of this type begets confusion in the law.

Political Responsibility: Choices for the 1980s, ¶ 51 (Oct. 26, 1979). The underlying dispute here results from the dissent by a practitioner with the interpretation of church doctrines on the place of mothers with young children and the resolution of disputes. It does not present a case of naked discrimination.

This case illustrates the need for the Court to clarify the relevant jurisprudence. The use of "excessive entanglement" as a separate "test" of action challenged under the Establishment Clause [*Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)] [3] does not serve the authentic purpose of that Clause in cases involving action *inhibiting* religion, as distinguished from those involving the impermissible advancement or preferment of religion. *Wallace v. Jaffree*, —— U.S. ——, 105 S.Ct. 2479, 2518 (Rehnquist, J., dissenting). Interpretation of the Clause has too often been sought in "tests" instead of in the careful application of the normative principles of construction. *Id.*, *see Aguilar v. Felton*, —— U.S. ——, 105 S.Ct. 3232, 3247-48 (1985) (O'Connor, J., dissenting). At their heart, the canons of construction require courts to discern the intention of the framers of a constitutional provision to give true meaning to the terms in question. *See Woodson v. Murdock*, 89 U.S. (22 Wall.) 351, 369 (1872); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). With respect to the Religion Clauses, those intentions are clearly expressed in the records of the First Congress and should move this Court (i) to instruct the judiciary and litigants that Establishment Clause "excessive entanglement" is not an appropriate separate analytical device in Free Exercise cases, and (ii) further, to abandon "excessive entanglement" as a separate test of Establishment Clause analysis by subsuming it under the "primary effect" prong of its Establishment Clause jurisprudence.

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[3] As stated in *Lemon v. Kurtzman*, the test is: "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one which neither advances nor inhibits religion; and third, the statute must not foster excessive entanglement with religion." 403 U.S. 602, 612-13 (1971).

ARGUMENT

Introduction

The Alternative Holding of the Court of Appeals Counsels Clarification by This Court That Intrusive State Regulation of Religious Institutions Directly Implicates the Free Exercise Clause, Not the Establishment Clause.

The Establishment and Free Exercise Clauses were intended by the framers to be complementary and comprehensive protections for religious liberty. "[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and *buttressing* this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." *Wisconsin v. Yoder*, 406 U.S. at 214 (emphasis added).

The court below recognized this key idea, quoting approvingly dissenting Justice Rutledge's observation in *Everson v. Board of Education*, that "[e]stablishment and free exercise were correlative and coextensive ideas, representing only single facets of the single great and fundamental freedom." *Dayton Christian Schools v. OCRC*, 766 F.2d at 945-56, *quoting*, 330 U.S. 1, 40 (1947) (dissenting). The court below also correctly recognized "the hallmark of analysis under the religion clauses is flexibility, emphasizing the objectives of the prohibitions, rather than court-refined 'tests' for ascertaining their parameters." *Id.* at 945. However, it expressed considerable reservations about its judicial task, noting "the difficult nature of the fine distinctions required" in Religion Clause cases and citing twenty-one of this Court's opinions construing the Clauses, including ten decided by a bare majority, and seven decided by 6-3 votes. *Id.* at n. 22.[4]

[4] The court below did not list *Mueller v. Allen*, 463 U.S. 388 (1983) (5-4) and several of the decisions from the last Term—*Aguilar v. Felton*, 105 S.Ct. 3232 (1985) (5-4), *School District of Grand Rapids v. Ball*, 105 S.Ct. 3214 (1985) (5-4, in part), and *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985) (5-1-3).

Perhaps because of the closeness of the votes and shifting majorities in this Court, the parties argued and the court below considered the validity of the OCRC actions under *both* Religion Clauses. In a seeming abundance of caution, the court concluded OCRC's actions violated *both* Clauses. It found that OCRC's regulation of Christian School violated the Establishment Clause, clearly not because of any perceived advancement or preference of religion, but because of the "excessive entanglement" of OCRC in religious affairs. This application of "excessive entanglement" in a Free Exercise case finds analytical support in some of this Court's Establishment Clause cases, but does not comport "with what history reveals was the contemporaneous understanding of [the purpose of the Establishment Clause]." *Lynch v. Donnelly*, 465 U.S. at 673. In the view of this *amicus*, whether the state has impermissibly burdened religious belief, practice, or governance embraces a concern directly implicated under only one Clause—the Free Exercise Clause. The alternative analysis of the court below illustrates plainly the need for greater analytical precision in the application of the Establishment Clause. *See generally* Devins and Feder, *First Amendment's Religion Clauses: Balancing Two Contrasting Views*, 8(11) Nat'l L.J. 24 (Nov. 25, 1985). The instant case is a timely vehicle for that clarification.

I

OHIO'S ATTEMPTED INCURSION IN THE DOCTRINAL DISAGREEMENT BETWEEN CHRISTIAN SCHOOL AND THE TEACHER UNJUSTIFIABLY INFRINGED RIGHTS ASSURED BY THE FREE EXERCISE CLAUSE.

Dayton Christian Schools is a religious institution, dedicated "to teach[ing] all subjects in a manner to create in each student an awareness of God's Supreme authority over all creation." *Dayton Christian Schools, supra*, 766 F.2d at 936. After an evidentiary hearing, the district court found:

> Every aspect of the school's operation is geared toward exposing and educating the students on how to lead a Chrisian life by understanding what the members consider to be the guidance and direction provided by the Bible. As revealed in the testimony at the hearing on this matter and in the exhibits accepted into evidence, the teachers at DCS are selected because of their ability to blend their avowed religious beliefs into every lesson and school activity. Teachers are required to be born again Christians. . . . [DCS] demands that teachers conform both in thought and conduct to the tenets and principles felt essential to leading a Christian life. The belief system espoused by the members of DCS touches every aspect of their life: work, interpersonal relationships, family and recreational activities.

578 F. Supp. 1004, 1018-19 (S.D. Ohio 1984). Christian School demanded that all teachers accept the Bible as interpreted in its Statement of Faith (*see* 766 F.2d at 936-37, n.8) as the basis for their employment. *Cf. Id.* at 937 (evaluation of an applicant's total acceptance of Christian lifestyle as basis for assessing suitability for employment). Owing to the nature of the hiring process and the religious commitment she had made (578 F. Supp. at 1018-19), the allegedly aggrieved teacher in this case could not have misapprehended the pervasively religious nature of the school, or the ways in which Christian School interpreted the Bible. Joint App., pp. 59-61; *see also* 766 F.2d at 940.

The record provides abundant support for the finding below [5] that all of the actions taken by Christian School which OCRC sought to nullify were in accord with and pursuant to religious beliefs. *See id.* at 939, 940, *quoting with approval*, 578 F. Supp. at 1012, 1013, 1031, 1032.

[5] As the court of appeals noted, the OCRC did not cross-appeal to challenge the district court's factual findings. *Dayton Christian Schools v. OCRC*, 766 F.2d 932, 936 n.6 and 940, n.15 (6th Cir. 1985).

Those beliefs were twofold: (1) mothers with young children should remain at home to rear them as an expression of religious values; (2) religious disputes within that community must be resolved according to a Biblical chain-of-command, not by recourse to civil authorities. Joint App., pp. 64-66, 69, 70. The actions of Christian School in this case were applications of religious precepts that permeated and governed every aspect of its operation. *See* Joint App., pp. 27-55 (Teacher's Manual).

The OCRC intruded into this religious controversy by means of a broad investigation, and by seeking to impose a settlement order in which Christian School would be obliged to agree to alter some of its basic practices, each rooted in Biblical interpretations. OCRC sought extensive employment data, handbooks and records, written explanations for the actions at issue here, complete job descriptions, records on the treatment of other pregnant employees, documents concerning all suspensions and discharges, minutes of School Board meetings, and complete personnel records for named individuals. 578 F. Supp. at 1014; Joint App., pp. 81-83. After its investigation, OCRC concluded the teacher had been a victim of sex discrimination under Ohio law, and required that Christian School reinstate the teacher and make future personnel decisions in accord with *OCRC's* standards and procedures. *See* 578 F. Supp. at 1015-16; Joint App., pp. 94-98. These actions unjustifiably infringed the free exercise of religion assured by the first amendment to Christian School and its supporting congregations and parents.

A. State Interference in Religious Doctrinal Disputes Is Barred by the Free Exercise Clause Absent a Substantial Showing of a Grave Threat to the Public Health, Safety or Order.

"[T]he Free Exercise Clause . . . , by its terms, gives special protection to the exercise of religion." *Thomas v. Review Board*, 450 U.S. 707, 713 (1981). "[T]he right

to free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions. . . ." *McDaniel v. Paty*, 435 U.S. at 626 (plurality). This precept applies in the instant case which involves an internal church dispute over matters of doctrine. As such, the Free Exercise Clause places it beyond the power of the civil authorities to regulate or adjudicate. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. at 714 (hereafter *"Serbian Diocese"*); *Watson v. Jones*, 80 U.S. at 728-29. *Cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

In language embraced as a constitutional rule in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952), in *Watson v. Jones*, this Court firmly denied the competence of the secular courts to resolve religious disputes. The Court there found the basis for this rule in the "full and free right to entertain any religious belief," and further noted that this right extends to the formation of religious bodies "to assist in the expression and dissemination of any religious doctrine. . . . All who unite themselves to such a body do so with an implied consent to [its] government, and are bound to submit to it." *Watson v. Jones*, 80 U.S. at 728-29. Religious disputes, therefore, are to be resolved in religious forums by the criteria and precepts of the faith involved. "[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not measurable by objective criteria." *Serbian Diocese*, 426 U.S. at 714 (footnote omitted). A dissenting member has no right to revisit a church dispute in a civil court. *Watson v. Jones*, 80 U.S. at 729. The reason for this "hands off" approach is obvious; dissenting members are free to leave a church over any matter at any time. *See Struemph v. Behan*, 661 S.W.2d 559, 563-64 (Mo. App. 1983), *cert. denied*, 104 S.Ct. 2659 (1984). The competence of civil courts and agencies is limited to disputes involving issues unrelated to religious belief.

Owing to the Free Exercise roots of this doctrine, although this Court has acknowledged there may be exceptions in grave circumstances, *Serbian Diocese*, 426 U.S. at 712-13, it has never permitted civil authorities to decide religious matters. Indeed, it has taken steps to prevent such interference. For example, the Court has required civil courts to apply "neutral principles" to adjudicate secular aspects of church property disputes, attempting to "free civil courts completely from entanglement in questions of religious doctrine, polity and practice." *Jones v. Wolf*, 443 U.S. 595, 603 (1979). In order to avoid such interference, the most important task for a reviewing court (made plain in *Serbian Diocese*) is to understand the precise nature of the dispute. What on its face appeared to be a property dispute in that case was, on more careful review by this Court, found to be dissent over religious doctrine. 426 U.S. at 709; *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969). Even where a valid secular interest is presented in a church dispute, this Court has directed that judges exercise extreme caution to avoid trammelling rights guaranteed under the Religion Clauses. *Cf. NLRB v. Catholic Bishop of Chicago, supra.*

The limits on the state's authority to control religious conduct are quite severe. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Thomas v. Collins*, 323 U.S. at 530, *quoted and applied in, Sherbert v. Verner*, 374 U.S. at 406. "The conduct or actions so regulated have invariably posed some *substantial threat* to public safety, peace or order." *Id.* at 403 (emphasis added, citations omitted). An examination of this Court's cases approving the imposition of state controls over religious practices illustrates "paramount interests" in mandatory vaccination of the public at large to avert a threat to the public health [*Jacobsen v. Massachusetts*, 197 U.S. 11 (1905)], promoting child health and welfare through enforcement of child labor laws [*Prince v. Massachusetts, supra*], pro-

tecting family life [*Reynolds v. United States*, 98 U.S. 145 (1878)], and avoiding corporate exemption from the social security tax system [*United States v. Lee, supra*]. As recited by one lower court, the state may regulate "religious operations that endanger public safety, threaten disorder [or] endanger the health of a member. . . ." *Turner v. Unification Church*, 473 F. Supp. 367, 372 (D.R.I. 1978) (citing cases), *aff'd mem.*, 602 F.2d 458 (1st Cir. 1979). Where the asserted interests of the state are not paramount or threatened by a "substantial threat," they recede. *See Sherbert v. Verner, supra* (interest in unemployment compensation penalizing individual believer's rights); *Wisconsin v. Yoder*, 406 U.S. at 217-18, 229-30 (interest in education, discussed below).[6]

The application of the controlling principle may be illustrated by a comparison of three cases. In *Wisconsin v. Yoder*, the state attempted to impose compulsory public education upon the Amish community, and to enforce that interest through the criminal law. If it prevailed, Wisconsin's education system would have supplanted the Amish system. This Court recognized the importance of the state's interest in education, but found that suppression of the religious practices of the Amish community was not warranted when no "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id.* On the other hand, in *Prince v. Massachusetts*, the failure to abide by child labor laws because of the parent's religious beliefs threatened not only the health and welfare of the child, but also the state's *parens patriae* interest. 321 U.S. at 166-67. Similarly, the imposition of the federal social security tax on Amish businesses in *United States v. Lee*, if defeated, could undermine the comprehensive nature of the social security system and cause injury to employees not part of the Amish religious community. 455 U.S. at 258-261. Thus, in viewing state claims, it is necessary to consider not only the nature of the underlying dispute, but also the consequences to the state if the attempt at regulation fails. In a doctrinal dispute involving employment decisions, where the decision affects only the "dissenter," bound to church authority, the Free Exercise claim must prevail.

[6] Although an interest like education has broader social implications, the impact of the exception allowed in *Wisconsin v. Yoder* and any perceptible harm from upholding the claim of the Amish parents fell solely within the group (406 U.S. 205, 217-18, 222-23) and did not threaten a person's life or health (*id.* at 229-30). Historically, the "free exercise of religion" as used in colonial statutes and charters had expressly or implicitly been limited by the proviso that religious freedom "does not license acts against the state." L. Whipple, *Our Ancient Liberities*, 64-65 73 (Da Capo ed. 1972) (discussing the 1649 Maryland Toleration Act, the 1663 Rhode Island Charter and the 1777 New York Bill of Rights).

B. The Court of Appeals Correctly Decided that the OCRC's Attempt to Regulate Christian School Violated the Free Exercise Clause.

The OCRC attempted to interfere with and resolve, in a secular forum, "serious philosophical differences" between Christian School and the teacher, differences inextricably intertwined with the interpretation of religious doctrine. Joint App., pp. 74-5. The actions of Christian School are intimately bound up in Scriptural interpretation. OCRC passed over these religious questions, and pressed instead for the application of secular standards to resolve a sectarian dispute. To permit OCRC to resolve that dispute under Ohio's anti-discrimination laws would run counter to this Court's caution that the "hazards are ever present of inhibiting the free development of religious doctrine and of *implicating secular interests in matters of purely ecclesiastical concern.*" *Presbyterian Church v. Hull Church*, 393 U.S. at 449 (emphasis added). The OCRC actions in this case insinuate the state into a religious dispute, in contravention of the Free Exercise Clause.

The opinion of the court below did not view the "serious philosophical differences" (Joint App., p. 70) between

Christian School and the teacher as going to the heart of a system of religious governance and discipine. It did not rest its conclusions on the *Serbian Diocese* line of cases,[7] and only cited that case in its discussion of Establishment Clause issues. *Id.* at 959 n. 47. Nonetheless, the court of appeals concluded that OCRC could not impose its judgment on Christian School without violating the same Free Exercise principles which were applied in the *Serbian Diocese* line of cases. *Id.* at 951. It chronicled OCRC's attempt "to coerce [Christian School] into acceptance of a Conciliation Agreement and Consent Order." *Id.* That order would have required Christian School to accept OCRC's "full and complete jurisdiction of the parties and subject matter herein," and "to be legally bound by [its terms]." Joint App., p. 95. The order would have required Christian School not to consider religion in the administration of any aspect of employment in a religious school. 766 F.2d at 951. These actions "affirmatively and coercively burden [the] exercise of . . . religious beliefs." *Id.* at 952.[8] The injury

[7] By contrast, in a recent decision, the Fourth Circuit correctly understood that the Free Exercise rights protected through a policy of non-interference in church-employee relations are those guaranteed under the *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) line of cases. *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1167-69 (4th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 20, 1985) (No. 85-1071). Even in *Rayburn*, however, the court applied "excessive entanglement" and the Establishment Clause as an alternative basis for its result, *see id.* at 1170-71, a further illustration of the need for clarity in this Court's doctrine discussed *infra* in Argument II, B.

[8] There are ways in which the state may apply its regulatory authority, such as in matters of health and safety, easily identified and regulated without intrusion, like certifications and health code compliance. *Cf. Aguilar v. Felton*, 105 S.Ct. at 3248 (O'Connor, J., concurring); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (examples of reasonable regulation). Every regulation is itself a limitation on liberty. Here, the OCRC was probing and regulating complicated personal relationships dictated by religious precepts. As Justice Holmes observed, regulation gone "too far" is a "taking". *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Just as

threatened by OCRC's actions was to thrust on Christian School "the option of either conforming [its] religiously based employment practices to the secular guidelines promulgated in the Ohio statute or face continued harassing prosecution by the OCRC." *Id.* That harm is what the *Serbian Diocese* line of cases is meant to prevent. 426 U.S. at 714 (footnote omitted).[9]

The actions here are all private and confined to adherents of a particular religious group. *See* 766 F.2d at 954. There is no threat, immediate or remote, to anyone's life or health, and certainly not to anyone outside this faith group. The injury, if any, falls to one person—the teacher who by her consent practiced the faith of Christian School and agreed to be bound by its code. Christian School, like the Amish community and other religions, never agreed to be bound by secular standards in its religious affairs. Thus, the instant case is like *Wisconsin v. Yoder*, 406 U.S. at 229-30, in terms of the degree of direct and significant harm to religion and the absence of harm to a state interest of the kind recognized by this Court to permit imposition of secular control of religious action. *See* cases cited at 13-14. OCRC's reliance on *Bob Jones University* to justify its efforts to control the actions of Christian School is misplaced. *Bob Jones University* involved the denial of a public benefit (tax exemption) to a religious institution which practiced racial discrimination. 461 U.S. at 603-04. It did not involve government control of religious practice or governance. Although there was a "burden" on religion, there

excessively intrusive police power took property rights in that case, here, religious liberty is taken.

[9] Even if the *Serbian Diocese* line of cases were not consistent with the court of appeals analysis (*but see* note 7, *supra*), this Court must give special attention to the record (as indeed it did in *Serbian Diocese*) and carefully explicate the precise first amendment principles applicable in this case. *See Bose Corp. v. Consumer's Union*, 466 U.S. 485, 499, 508, 510-11 (1984). This application of principle is more faithful to the underlying facts.

was no compulsory incursion into religious beliefs and practices. The withdrawal of the benefit of tax exemption did not require the University to change its religious practice. *Id.* at 604. In contrast, under the OCRC regulatory umbrella, Christian School was obliged to alter its religious practices or face continued state harassment.

OCRC's effort to review and overturn Christian School's actions violated the Free Exercise Clause. As stated in *Serbian Diocese*, "religious freedom encompasses the 'power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" 426 U.S. at 721-22, *quoting*, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. at 116. This principle is dispositive of the instant dispute.

II

THE ESTABLISHMENT CLAUSE, CONSTRUED ACCORDING TO ITS AUTHENTIC HISTORICAL PURPOSES, SHOULD NOT BE APPLIED IN THE ABSENCE OF EVIDENCE OF IMPERMISSIBLE ADVANCEMENT OR PREFERENCE OF RELIGION. THE OPINION BELOW SHOWS THAT THE CONTINUED USE OF "EXCESSIVE ENTANGLEMENT," AS CURRENTLY APPLIED, CAUSES ANALYTICAL CONFUSION. IN SOME CASES IT HAS WROUGHT RESULTS AT ODDS WITH THE HISTORICAL AIMS OF THE CLAUSE.

The court of appeals applied the "excessive entanglement" prong of the test adopted in *Lemon v. Kurtzman* to evaluate, under the Establishment Clause, the same considerations already disposed of under the Free Exercise Clause. Such duplicative effort would be avoided if the Establishment Clause were applied in accord with its authentic purpose. *See Wallace v. Jaffree*, 105 S.Ct. at 2518 (Rehnquist, J., dissenting). It would be appropriate for this Court to reassess the application and general utility of "excessive entanglement" as part of Establishment Clause analysis. The court below found that "[t]he

statute in this case, as applied by the OCRC, clearly operates to discourage the practice of religious belief." 766 F.2d at 961. Although it called this action "excessive entanglement," it is the kind of action that the Free Exercise Clause was intended to prevent. Clarification of this principle is not only proper, but necessary.

A. The Framers Intended That the Religion Clause Be Applied Harmoniously as Complementary Protections of Religious Liberty. The Establishment Clause Was Intended to Buttress Free Exercise by Denying to the State the Authority to Prefer or Impermissibly Advance Religion.

The purpose of *both* Religion Clauses was to protect religious liberty. *Wisconsin v. Yoder*, 406 U.S. at 214. The Establishment Clause reflects the experience of the framers that officially preferred or established religion generates religious intolerance and infringes upon personal liberty. *E.g., School District of Abington Township v. Schempp*, 374 U.S. 203, 221-22 (1963); *Torcaso v. Watkins*, 367 U.S. at 490.[10] Responding to the express wishes of five States in their resolutions of ratification,[11]

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[10] As discussed in *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961), the colonists often drafted their laws to impose some burden on those beliefs that varied from those of the group with dominant political power. "The effect of all this [colonial legislation] was the formal or practical 'establishment' of particular faiths in most of the colonies, with consequent burdens imposed on the free exercise of the faiths of nonfavored believers."

[11] During the ratification process for the constitution, some states expressed concern because the constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia specifically addressed the issue of religious freedom in their ratifying acts. Four states (New Hampshire excepted) also addressed the issue of a prohibition against an established religion, in terms of preferring one religion over others. I Debates on the Adoption of the Federal Constitution 328 (2d ed. J. Elliott ed. 1836) (New York), *id.* 334 (Rhode Island), III *id.* 659 (Virginia), and IV *id.* 244 (North Carolina). However, many, including Madison, believed that religion was not the province of the new government and that further clarification was not needed. III *id.* 330. Madison argued that the religious diversity of

in the First Congress, James Madison introduced this first version of what became the Religion Clauses of the first amendment:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

As Madison explained, the "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Congress* 730 (Gales & Seaton eds. 1789).[12]

The Religion Clauses were designed to protect religious liberty both by prohibiting interference in personal religious beliefs (both clauses), and by specifically assuring that no religion could gain the special favor of the government, thereby subverting others. (Establishment Clause). L. Whipple, *Our Ancient Liberties*, 66-68 (Da Capo ed. 1972). A prohibition of laws infringing the free exercise of religion would have been enough to mandate tolerance. Tolerance, however, could have meant that even though all could worship in peace, some religion might still be preferred by the state. Hence, the framers also denied to the new government the power of preference (note 12, *supra*), and thereby required equal treatment of all religions. *Id.* at 72.

The legislative debates evidenced little, if any, disagreement with these objectives but showed anxieties borne of other concerns.[13] The Religion Clauses that emerged

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the new country made preference politically untenable. *Id. See generally* 1 *Annals of Congress* 731 (Gales & Seaton eds. 1789).

[12] *See id.* at 432-36. Madison also recited a popular fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 730-31.

[13] For example, a reference to "national" religion (*infra* note 14) provoked debate on whether the new government was to be national

from this process were a House-Senate compromise.[14] The

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or federal. *Annals, supra* note 11, at 731. There was also a concern that the new government might interfere with the autonomy of states in religious matters, no small matter to those that maintained "established" churches. *See* Corwin, *The Supreme Court as National School Board*, 14 Law & Contemp. Probs. 3, 10 (1949).

[14]

HOUSE LANGUAGE	SENATE LANGUAGE
Madison's Proposal—June 8	September 3
The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.	Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.
Select Committee—July 18	Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.
No religion shall be established by law, nor shall the equal rights of conscience be infringed.	Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.
Livermore's Language—August 15	Congress shall make no law establishing religion or prohibiting the free exercise thereof.
Congress shall make no laws touching religion, or infringing the rights of conscience.	Final Text—September 9
Ames Language—August 20	Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion. . . .
Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.	
Final Text—August 24	
Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.	
COMPROMISE	
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .	

language finally selected satisfied the major objectives of the recommending states, as noted by Madison (*Annals*, *supra* at 432-36, 731), but respected the concerns of his peers (note 13, *supra*).

The phrase "respecting an establishment" had two purposes, first to prevent Congress from establishing or favoring a national religion, and second to prevent Congress from interfering with a state's policies with regard to religion.[15] The phrase "respecting an establishment" cannot reasonably be read to mean merely concerning or touching upon religion. Indeed, that was the terminology of a proposal by Livermore which was eventually rejected by the House.[16] The word "establish" was consistently used to refer to federally-preferred religion in the amendments recommended by the states, by Madison in the House debates, and in versions of the measure in both House and Senate. Notes 11, 12, and 14, *supra*. There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to suggest less than an establishment or preferment of religion. The language of the Clause does not concern itself with religion in general, but with the particular problem of the establishment or preferment of a religion.

The drafting process reflected the framers' experience with the historical realities of "establishment." About

[15] *Annals*, *supra* note 11 at 730-31. Stokes argued that "respecting an establishment" was intended to confine the new Congress' regulatory power over religion. 1 A. Stokes, *Church and State in the United States*, 539-40. Stoke's view, like that of this *amicus*, was that the Religion Clauses were intended to offer protection *for* religion. *Id.* at 556. The detail of the legislative debates is in the brief of this *amicus* in *Mueller v. Allen*, *supra* and in the opinion of Justice Rehnquist in *Wallace v. Jaffree*, 105 S. Ct. at 2500, *et seq.*

[16] Note 14, *supra*. Although Livermore's proposal passed on August 15, 1789 without any recorded debate, it was not the language eventually adopted by the House. 1 *Annals*, *supra* note 11, at 731, 765, 778.

half a century later, the Senate Judiciary Committee adverted to that experience when it rejected a citizen's petition urging that provisions for legislative and military chaplains should be abolished as an "establishment of religion." In its Report in 1853, the Committee explained that "'establishment of religion' . . . referred, without doubt, to that establishment which existed in the mother country." S. Rep. No. 376, 32d Cong., 1st Sess. 1 (1953). It meant:

> the connexion [sic] with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances.

Id. This description provides a strong summary and important interpretation of the historical church-state involvement which led to the Establishment Clause.

B. Unjustified and Entangling State Interference in Religious Affairs Infringes the Free Exercise Clause, Not the Establishment Clause Properly Construed.

Opponents of the assertion of state regulatory control over churches and their operations argue that such control "excessively entangles" church and state in violation of the Establishment Clause. Such an argument emanates from some of the opinions of this Court in the last fifteen years.[17] What started out in *Walz v. Tax*

[17] Those subjected to the state action quite naturally utilize every analytical tool available to avert the imposition of regulatory authority. Like other litigants, this *amicus* has at times argued for that same interpretation where state encroachment into religious matters "carries some involvement rather than the desired insulation and separation." *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970). *See, e.g., Surinach v. Pesquera*, 604 F.2d 73 (1st Cir. 1979). Before this Court, this *amicus* urged reformation of the entangle-

Commission as an alternative way of viewing "primary effect" has achieved significant independent and, in the view of this *amicus*, misdirected application. *See Aguilar v. Felton*, 105 S.Ct. at 3236. The majority opinion in *Walz* stated that evaluation of the purpose of state action to assure it is "not aimed at establishing, sponsoring, or supporting religion does not end the inquiry. [A court] must also be sure that the end result—the effect—is not an excessive government entanglement with religion." *Walz v. Tax Commission*, 397 U.S. at 674.

An offshoot of the "primary effect" test of government action, "excessive entanglement" reflected the historical aims of the Establishment Clause. *See id.* Thereafter, this analytical device became an independent criterion in *Lemon v. Kurtzman*, 403 U.S. at 612-13, and has since been so applied. More pertinent to this discussion, it has been applied not only to serve the authentic purpose of the Establishment Clause to prohibit an officially preferred religion, but has also been pressed into unnecessary service under the Free Exercise Clause, side by side with the principles derived in cases thereunder for that purpose (*supra* at 13-15). *Cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. at 495-97, 501-04.

The use of "excessive entanglement" apart from the historical purposes of the Establishment Clause leads litigants and courts to argumentation and analysis which can distort the authentic meaning of the Clause, a buttress for Free Exercise (*Wisconsin v. Yoder*, 406 U.S. at 214) through its guarantee of government neutrality in religious matters. It becomes a tool of convenience, not principle. Such arguments are framed by parties and disposed of by courts as a separate hurdle, unrelated to the underlying purpose of the Clause. *See Aguilar v. Felton*, 105 S.Ct. at 3247-48 (O'Connor, J., dissenting).

...ment doctrine (as an inhibition on religion) to recognize its roots in authentic Free Exercise Clause concerns.

Such continued use of "excessive entanglement" can only breed confusion at a time when clarity is required. If "excessive entanglement" is another way of saying that the "effect" of governmental action may lead to some illegal preference, it should be resolved under the Establishment Clause as originally set forth in *Walz v. Tax Commission*, *supra*. *See Roemer v. Board of Public Works*, 426 U.S. 736, 755-63 (1976) (plurality). However, as it concerns *regulation* cases (like the instant case), "excessive entanglement"—described in terms of "government interference with religion" (*Walz*, 397 U.S. at 669, 670; *see id.* at 674-75),[18]—is another way of expressing the harms that the Free Exercise Clause was meant to prevent, namely, actions that unjustifiably coerce or suppress religious belief, practice or governance. *See Wallace v. Jaffree*, 105 S.Ct. at 3518 (Rehnquist, J., dissenting).

C. Precise Application of the Establishment Clause Calls into Question Continued Use of "Excessive Entanglement" as a Separate Analytical Standard Which Has Caused Undesirable Results in Some Cases.

The subtle departure in some cases from the precise objective of the Establishment Clause tends to extend the reach of this Court's authority. It reaches not just to matters clearly incompatible with the Clause, the test for appropriate judicial intervention envisioned by Chief Justice John Marshall [*see Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1809)], but also to cases in which

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[18] Perhaps a connection between entanglement and the Free Exercise Clause was not discussed because plaintiffs lacked standing to press a "free exercise" claim. *See McGowan v. Maryland*, 366 U.S. 420, 430 (1961). In *Walz*, this Court came closest to the theme this *amicus* suggests for resolution of Religion Clause issues—whether the challenged state action actually tends to impair the plaintiffs' religious liberty. *Walz v. Tax Commission*, 397 U.S. at 669. These considerations were noted recently by Justice Rehnquist in *Wallace v. Jaffree*, 105 S.Ct. at 2518.

the record is barren of evidence of any threat to authentic constitutional values. *Aguilar v. Felton*, 105 S.Ct. at 3241 (Powell, J., concurring); *Grand Rapids v. Ball*, 105 S.Ct. 3216, 3225-36 (1985).

Because of its substantial stake in the course of this Court's decisions in this area, this *amicus* has endeavored to illuminate the meaning of the Religion Clauses through careful historical reference and the application of the canons of construction. In its brief in *Mueller v. Allen*, 463 U.S. 388 (1983), it explained in detail the history embodied in the Establishment Clause as a point of departure for that case and others.[19] It seemed to this *amicus* that Establishment Clause jurisprudence became somewhat misdirected through the unguided use of "entanglement," separated from the tests of purpose and primary effect. In two cases decided last Term, this *amicus* expanded upon its historical analysis and sought reassessment of the *Lemon* test of purpose, effect, and entanglement. *Amicus* Br. in *School District of Grand Rapids v. Ball, supra* at 4, 16-25; *Amicus* Br. in *Aguilar v. Felton, supra*, at 19, 22-24. In particular, this *amicus* focused on excessive entanglement as a two faceted concept—active government involvement with religion that either (1) tended to establish or prefer a religion, or (2) burdened the free exercise of religion. *Id.* at 22. "Entanglement" should become absorbed into the "effect" aspect, to the extent the Establishment Clause would be involved at all.[20] To do so, however, would require change in the *Lemon* test.

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[19] That brief was filed in the October 1982 Term. *See Mueller v. Allen*, 463 U.S. at 399-400. In the October 1983 Term, this Court pronounced that the Establishment Clause should be interpreted according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

[20] Those governmental involvements that show illegal support or preference can, and should be, dealt with as an aspect of the "effect" prong of Establishment Clause analysis. The other kind of involvement—governmental interference—implicates only Free Exercise concerns. *See* Argument II.B, *supra*. The need for a unifying construction of both Religion Clauses is urged by this *amicus* in its submission in *Bender v. Williamsport Area School District*, *cert. granted*, 105 S. Ct. 1167 (1985) (No. 84-773), now *sub judice*.

In *Grand Rapids* and in *Aguilar*, bare majorities of this Court decided important constitutional issues through what seems to this *amicus* to be a rigid application of the *Lemon* test, leading to a result judged by many as damaging to a crucial educational program when there was no real threat to the overriding purpose of the Establishment Clause. *See Grand Rapids v. Ball*, 105 S. Ct. at 3222-23; *Aguilar v. Felton*, 105 S. Ct. at 3241 (Powell, J., concurring). Yet this Court has not been willing to abandon the *Lemon* test. *Wallace v. Jaffree*, 105 S. Ct. at 2493-2494 (Powell, J., concurring) *and* 2496-97 (O'Connor, J., concurring). Although the Court has counseled care in use of the "test," *Lemon v. Kurtzman*, 403 U.S. at 614, its application has rightly been criticized as rigid and mechanical, even by its author. *See Wallace v. Jaffree*, 105 S.Ct. at 2507 (Burger, C.J., dissenting). Simplistic literary devices persist, for example, the "wall of separation" metaphor used to describe a "proper" church-state relationship. *Cf. Wallace v. Jaffree*, 105 S.Ct. at 2518 (Rehnquist, J., dissenting) ("difficulties arise because the *Lemon* test has no more grounding in . . . history . . . than does the wall theory"). A major problem is "entanglement." *Id.*; *Aguilar v. Felton*, 105 S.Ct. at 3247-48 (O'Connor, J., concurring). The time seems right to adjust the course of Establishment Clause analysis through a reconsideration of "entanglement" as a separate analytical tool.

Quite plainly, it is the province of the courts to say what the law is and to enforce it. *Marbury v. Madison*, 5 U.S. (1 Cranch) 37 (1803). This Court has bound itself to construe the constitution reasonably, giving terms their "natural and intended meaning . . . not in a

sense unreasonably restricted or enlarged." *Martin v. Hunter Lessee*, 14 U.S. (1 Wheat.) at 326; *see id.* at 328-330. Ultimately, "every clause in every constitution . . . must have a reasonable interpretation, and be held to express the intentions of its framers." *Woodson v. Murdock*, 89 U.S. (22 Wall.) at 369. Departure from this normative principle of construction transposes the judiciary into the kind of broad decision-making usually reserved to the states and to the Congress. *See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 419, 557-58 (1978). This case presents a timely vehicle for this Court to reassert the authentic message of the Religion Clauses by clarifying the complementary relationship between the two Clauses intended by their framers.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed on the ground that the actions of the Ohio Civil Rights Commission violate the Free Exercise Clause.

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BRIEF

No. 85-488

Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

OHIO CIVIL RIGHTS COMMISSION,
Appellant,

v.

DAYTON CHRISTIAN SCHOOLS,
Appellees.

APPEAL FROM THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, CONNECTICUT, DELAWARE, GEORGIA, MINNESOTA, MONTANA, TENNESSEE, TEXAS, AND VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLEES

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IN THE

Supreme Court of the United States

October term, 1985

No. 85-488

OHIO CIVIL RIGHTS COMMISSION,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS,
Appellees.

APPEAL FROM THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, CONNECTICUT, DELAWARE, GEORGIA, MINNESOTA, MONTANA, TENNESSEE, TEXAS, AND VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLEES

INTEREST OF AMICI CURIAE[1]

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrew's University. The Rutherford Institute is composed of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of religious liberty and other

[1]Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

constitutional guarantees. With state chapters in Alabama, Connecticut, Delaware, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, the Rutherford Institute has undertaken to assist litigants and participate in significant cases relating to First Amendment religious freedoms. The Rutherford Institute seeks to promote, assure and enhance the freedom of religious persons in the proper exercise of their faith in conformity with the protection afforded by the United States Constitution.

Because of its acute sensitivity to violations of the freedom of religion, the Rutherford Institute has increasingly become one of the nation's most effective and responsible commentators in this important field. Moreover, counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

Amici Curiae, therefore, have a vital interest in seeking affirmance of the lower court's decision. If the lower court decision is reversed, it would detrimentally result in denial of Appellee's priceless constitutional freedoms.

STATEMENT OF FACTS

Amici Curiae adopt by reference the statement of facts as set forth in Appellees' brief filed with this Court.

SUMMARY OF ARGUMENT

The legitimacy of the Ohio Civil Rights Commission's assertion of jurisdiction over Appellees ultimately depends upon a choice between two different conceptions of liberty. In the first conception, which we shall refer to as the purely individualistic conception, associational freedom is seen as wholly derivative of individual liberties. In the second, which we shall refer to as the nonderivative conception, associational freedom is seen as having intrinsic value. The latter conception is, with important qualifications, descriptive of the historical and constitutional role of associational freedom in our society. Nevertheless, the first conception exerts a powerful, if subliminal, influence over thinking about associational freedoms.

Associational freedoms rooted in a purely individualistic conception must dissolve in the face of, and to the extent required by, an individual claim to deprivation of liberty. This is merely tautological, for if the associational right is constructed for the sole purpose of advancing individual liberties, it cannot simultaneously be made to defeat them. Yet precisely for this reason the model of associational liberty defined by the individualistic conception is alien to American constitutionalism, for it deprives intermediate associations — associations that stand between the individual and the state — of anything but an instrumental role. It thus denies the much richer, if less domesticated, role such associations have historically played in our society.

If the contrast between the model of associational liberty defined by the individualistic conception and the historical role of associations is clear, it is nonetheless far from intuitively obvious that the clash is one of constitutional dimension. Indeed, the individualistic conception seems, at first blush, to suggest a constitutionally acceptable resolution to the inherent conflict between associational authority and individual liberty. It recognizes associational authority as a formal value, and defines a zone of freedom — the scope of individual liberties — that must be carved out from an association's authority.

In so doing, however, the individualistic conception models the social structure of associations after the image of the state. The failings of the individualistic conception are best captured by the concept of a structural dimension of liberty. This has in fact been the animating concept of religion clause adjudication, for the religion clauses establish a structural relation between religious associations and the state. The postulates of the individualistic conception thus are entirely out of place in cases, such as the present one, that raise questions of religious auton-

omy. Though a structural or derivative analysis recognizes limits to religious autonomy, it implies, at a minimum, a degree of autonomy that would foreclose the general imposition of constitutional norms upon the affairs of a religious association. Thus, Ohio's statutory scheme, which asserts the general applicability of public norms to associations such as Appellees, would, by hypothesis, fail to pass muster under a nonderivative analysis.

ARGUMENT

I.

Two Conceptions Of Associational Liberty: The Choice Between A Purely Individualistic Conception That Recognizes Only The Instrumental Features Of Associational Liberty And A Nonderivative Conception That Recognizes The Structural Dimension Of Liberty.

The central issue in this case is whether the constitutional value of private associations derives solely from their role in fostering individual liberty, or whether there is an independent constitutional justification for them that does not depend upon their instrumental value. It follows from the former conception that associational governance must conform to significant constitutional norms regarding individual liberties. The latter conception would permit a departure from such norms in some, though clearly not in all, cases. In either case, lines will inevitably have to be drawn limiting the autonomy of private associations. It is, nonetheless, important to identify the conception that is guiding the doctrinal choices that must be made. For at bottom, these two conceptions represent two very different theories of government.

The excessively individualistic focus of the former conception obscures what might be termed the structural dimension of liberty. Drawing out the implications of the individualistic model, as we shall do below, makes it easy to see the central importance of the structural dimension of liberty in our system of government, and hence the

theoretical inadequacies of the individualistic model as a constitutional conception. It is important for this purpose to distinguish between political and constitutional conceptions. As a political theory, the purely individualistic conception may count as its supporters some political philosophers. Our concern, however, is with its validity as a constitutional theory, and it is precisely here that it fails.

A. The Constitutional Inadequacies Of A Purely Individualistic Model Of Liberty And The Historical Recognition Of A Structural Dimension Of Liberty.

A purely individualistic conception of liberty cannot provide a complete account of the system of government established by our Constitution. If elaborated to its logical extreme, such a conception would indeed turn on itself, embracing a social vision that would strip from us freedoms we rightly count as significant expression of that liberty. A purely individualistic conception of liberty, uninformed by any substantive insights, would for example ultimately require eliminating the family as we know it, and replacing it with a social unit refashioned in the image of the state. It is not merely a failure to regard the *form* of social structures that impoverished this model of liberty, for a society vigorously reconstructed after a purely individualistic model might have a similar social configuration. Families might still exist (though such a model would not require them), but they would necessarily lack many of the characteristics that we now consider intrinsic to them. Whatever the merits of such a model as a political theory, it is fatally deficient as a constitutional theory because it ultimately deprives intermediate associations — associations that stand between the individual and the state — of anything but an instrumental role. As such, it denies the legitimacy of the much richer, if less domesticated, role that such associations have historically played in our constitutional scheme.

1. The Essentially Iconolastic Role Of Intermediate Associations In Democratic Theory And Practice.

A fair description of that role must concede that associations have not always served the instrumental aim of advancing public values, either in their social practices or in their ideological agendas. Indeed, the dominant impact of associations has probably been to perpetuate traditional views and practices as against developing constitutional norms. They have, in any case, at least frequently advanced values that diverge from constitutional norms. The role of associations in permitting divergence between private and public values is thus an important feature of our form of government as it has functioned historically. For this Court to adopt a constitutional role requiring private associations to conform to public values would therefore effect a shift away from our historical form of government.

The historical form may not of course be the constitutional form, *see Engel v. Vitale*, 1370 U.S. 421 (1962); *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203 (1963), though a clear historical pattern is powerfully suggestive of constitutionality. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 790 (1983), *Lynch v. Donnelly*, 104 S.Ct. 1355, 1354-61 (1984). Far from being constitutionally anomalous, the function private associations have historically performed is required by democratic theory.

The power of an association to govern itself is indeed an awesome power, for it is the power to constitute a sphere of authority independent of the state. It was precisely this recognition that led Hobbes and Rousseau to opine against associations. *See* R. Horn, *Groups and the Constitution* 5-7 (1956). In democratic theory, however, associations perform a critical checking function by locating a portion of the power to define society in numerous, diverse, autocephalous power centers, which together offset the state's power of definition. *See generally* P. Berger and R. Neuhaus, *To Empower People: The Role of Mediciting Structures in Public Policy* (1977). The dispersion of power creates a variegated and uneven political landscape resistant to the strong levelling tendencies of the state. Such a conception informed Madison's theory of democracy: that factions cannot be eliminated without artificially constraining man himself, whose nature tends to factions, and so must be controlled by dispersion. *See* R. Dahl, *A Preface to Democratic Theory* 15-17 (1956). In the Madisonian theory, the power of the state, as the ultimate faction, must therefore be offset by numerous other factions. The view that associations have an irreducible value, thus, may be traced to the origins of our form of government.

2. The Hostility Between The Individualistic Conception And The Constitutional Function Of Intermediate Associations.

A purely individualistic conception of liberty, however, denies associations the very characteristics that enable them to offset government power. This may be seen by considering first the limits on the authority of an association implied by an individualistic conception and, second, the effect that these limits have on the character of an association.

Associational freedoms rooted in a purely individualistic conception must dissolve in the face of, and to the extent required by, an individual claim to deprivation of liberty. This is merely tautological, for if the associational right is constructed for the sole purpose of advancing individual liberties, it cannot simultaneously be made to defeat them. By contrast, if the right of an association to govern itself (as against the state) is something more than a derivative right, then by hypothesis at least some such claims may be denied. Under a nonderivative model, establishing a deprivation of liberty does not therefore advance analysis; indeed, it merely invites analysis. In order for analysis to proceed, appeal must be made to some superordinate principle. Without determining what particular principle might serve this purpose, it is nevertheless possible to assert that the power of such an association to govern itself would not be coextensive with

the protection of its members' liberties; otherwise this latter kind of associational freedom would simply collapse into the former. This is not to say that a deprivation of liberty would always be within the power of such an association, but only that some other principle must define the limits of that power. If associational rights are not wholly derivative one cannot look solely to deprivation of liberty to specify their limits.

Despite the enormous conceptual gap between purely individualistic and nonderivative models of associational freedom, the two models converge in cases in which individuals are united in their claim as against the state to a particular associational freedom, such as the right to marry. *Cf. Roberts v. United States Jaycees*, 104 S.Ct. 3244, 3249 (1984) (noting that "[t]he intrinsic and instrumental features of constitutionally protected association may, of course, coincide.") The individualistic model will never allow significant deprivations of liberty, precisely because it recognizes no associational freedom that does not further individual liberty. Yet because the individualistic model recognizes associational freedoms as a formal, if merely instrumental, value, such a model makes it possible to conceive of associational freedoms as coexisting with individual liberties. In this view, the scope of individual liberties simply defines a zone of freedom that must be carved out from an association's authority. By implication, this would leave an association with some residual authority. It thus could be said that individual liberties constrained, but did not deny, the governing authority of the association.

If this seems familiar, it is because it describes the model of individual-government relations that orders our society generally. Superimposing this view of the individual-government relations on private associations would do more than constrain them, however. It would, indeed, recreate them in the image of the state.[2] Such a constraint

[2] *See Poe v. Ullman*, 367 U.S. 497, 521-22 (1961) (Douglas, J., dissenting) (*quoting* Calhoun, *Democracy and Natural Law*, 5 Natural

would catabolize the internal structure of associational freedom, preserving it in its outward form only. An association governed by such a constraint would, to be sure, have a formal independence, but its subordination to public values would cripple the association's ability to differentiate itself from society at large. It would in principle deny the role of certain associations "as critical buffers between the individual and the power of the state." *Roberts, supra*, at 3250. It would thus deny the *raison d'etre* of intermediate associations in our constitutional system. Although such a conception would leave associations with some authority, it would take from them the very characteristics that give them independent significance in democratic theory.

B. Discontinuities In The Current Doctrine Of Associational Freedom: The Fortuitous Historical Convergence Of, And Concealed Tensions Between, The Two Conceptions.

If two models of associational liberty converge in cases in which an association is not internally divided, they will by definition also appear to converge whenever discontented members fail to express any latent conflict. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 242 (1972) (Douglas, J. dissenting) (recognizing that grant of religious exemption to Amish parents operated "to impose the parents' notions of religious duty upon their children.").

(footnote 2 continued)

Law Forum, 31, 36 (1960)): "One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommittees - family, school, business, press, church - completely subject to control by the State. The State then is not one vital institution among others: a policeman, a referee, and a source of initiative for the common good. Instead, it seeks to be coextensive with family and school, press, business community, and Church, so that all of these component interest groups are, in principle, reduced to organs and agencies of the state. In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community."

The combination of actual and apparent convergence of these models in past cases may explain why recognition of the need to choose between them, let alone a clear impression of which conception animates current doctrine as a whole, has yet to emerge from this Court's decisions. This ambiguity is not, however, attributable to this Court's failure to take the structural dimension of liberty seriously. The decisions of this Court have given wide berth to the historical role played by private associations and have recognized rights that would seem inexplicable on any other ground. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Indeed, precisely for this reason, the contrast suggested above between a society in which associations serve a wholly instrumental role and one in which their conformity to public values is largely, if not completely, voluntary, may seem somewhat overdrawn. This Court has, after all, accorded significant constitutional protection to particular kinds of associations as well as to the freedom of association in general. These protections would seem to limit the degree to which the state could interfere with such associations. For example, this Court has protected against legislative interference the right of parents to send their children to private schools, *Pierce v. Society of Sisters, supra*; the right of individuals to obtain and use contraceptives and thereby to effectuate childbearing decisions, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right of women to abortion, *Roe v. Wade*, 410 U.S. 113 (1973); the right of individuals to marry, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967); and the right of married couples to divorce. *Boddie v. Connecticut*, 401 U.S. 371 (1971).[3] Yet these same de-

[3]This Court has, moreover, on occasion generalized these rights into formulations that imply that certain relationships are protected for their own sake. *Roberts v. United States Jaycees*, 104 S.Ct. 3244, 3250 (1984) ("certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity

cisions typically use the rhetoric of individual rights. *See Roberts supra* at 3250 ("Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.")

So long as the members of an association are united in their claim for protection against the state, it is not necessary to determine whether constitutional protection extends to the association *qua* association or whether on the other hand, it extends to the association as a mere vehicle for the expression of individual rights. But when, as in this case, the members of the association are divided, and the individual rights of one or more are pitted against the associational rights of the group, it becomes critical to determine the underlying theory. The present case thus poses for this Court the opportunity to secure the constitutional moorings of those associational rights that have been identified by tying them to a framework that recognizes the structural dimension of constitutional freedoms.

C. Drawing Out The Implications Of The Individualistic Conception: Family Structure And The Foreignness Of The Individualistic Conception To American Constitutionalism.

Because of the significance of individual rights in our constitutional system, the evaluation of the protections that ought to be afforded them in an associational context tends to invite transition from a nonderivative model to an individualistic conception. The issue is not whether individual liberties are important, however, but how to evaluate them in the context of a structure whose integrity is itself constitutionally significant.[4] The individualistic

(footnote 3 continued)
and act as critical buffers between the individual and the power of the State.")

[4]The idea that certain associational structures have independent constitutional value is fundamentally a denial of the proposition that

conception, as we have seen, views associational liberties as derivative of individual liberties and asserts that all social structures must accommodate individual liberty in the same way and to the same extent that the state does. How this diverges from the model of liberty upon which our society is patterned may perhaps best be seen by comparing social structures familiar to us with their counterparts in a society reconstructed in accordance with a purely individualistic conception. In particular, the implications of the individualistic conception for the structure of the family relations give powerful social form to the argument that such a conception is theoretically foreign to American constitutionalism. Before considering the implications of such a model for religious associations, it is therefore worthwhile to examine the dramatic contrast between the family structure projected by a purely individualistic conception and the traditional family.

This Court's opinions contain many references to the constitutional protections that attach to the family relationship. In the seminal case of *Pierce v. Society of Sisters*, *supra*, this Court held:

> [T]he fundamental theory of liberty upon which all governments in this Union repose, excludes any general power of the state to standardize children by

(footnote 4 continued)

all social structures must conform to an abstract version of individual liberty, as elaborated to take into account the conflict between individuals implicit in any social order. It is not, however, a denial of the value of individual liberty, but rather a recognition that there is an important aspect of individual liberty that finds expression only in particular social forms. The ordering of any social arrangement will inevitably restrict the liberty of some in order to give vent to the liberty of others. It is sheer chauvinism, however, to claim that the state's way of resolving this dilemma in the context of the relations of the individual to the state is the only valid way to do so. It would, indeed, seem incredible to claim that a particular model of individual-state relations should inform the structure of all social relations. The social dynamics of the family, for example, may bear little or no relation to the dynamics that inform the model of individual-state relations reflected in our constitution. Yet it is just such a claim that underlies the State of Ohio's demands in this case.

> forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535. *See also Meyer v. Nebraska*, *supra*. As Harvard Law Professor Laurence Tribe has noted, however, the Court in *Pierce* "conspicuously passed over 'the right of the child to influence the parent's choice of a school.' " L. Tribe, *American Constitutional Law* 882 (1978) (*quoting Pierce, supra*, at 532.) The possibility that an association will tyrannize its members is a tempting predicate to state intervention and regulation. In the context of the family, this tyranny takes the form of parents inhibiting or denying their children certain rights. The constitutional protections that extend to "child rearing and education," *Carey v. Population Services International*, 431 U.S. 678, 685 (1977), "the sanctity of the family" *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and so forth, embrace and at the same time elide this fundamental antinomy.[5]

Historically, courts and legislatures in the United States resolved the tension between the rights of children and parents by making a substantive move. They simply regarded parents as having plenary authority over their children. *See, e.g., Commonwealth v. Armstrong*, 1 Pa. L.J. Rep. 393 (1842) (penalizing minister for baptizing a

[5]The latent tension between the rights of parents (representing group or associational rights) and the rights of children hovered near the surface of this Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) in which this Court protected the right of Amish parents to keep their children out of public schools after the eighth grade. The protection extended by this Court placed the power of the state behind the parents and against the potential interest of the children in attending public schools. Justice Douglas's dissent, modelled on an individualistic conception, would have conditioned parental rights on a showing of at least some degree of consent by the children. *Id.* at 242-43.

seventeen year old girl against her father's wishes as violative of parental authority.) This was thought to follow from the nature of the family as a divine and social institution. *Id.* at 393-95. These early courts observed a sort of bright-line rule that brooked no interference with parental authority, short of that which might be necessary to save a child's life.

Within the umbrella of this general approach, one could nevertheless discern different substantive views among courts about what might be the particular limits of parental authority. None of these views, however, could have withstood critical analysis under a purely derivative theory that sought to limit the rights of parents in accordance with some theory on the liberty of children. On the contrary, these courts clearly entertained a substantive assumption that, apart from certain exceptional cases, children's rights were subordinate to the rights of parents to direct their upbringing. The critical substantive move was not to a particular view of what parents could or could not do, for as to that there was undoubtedly some, if only minimal, disagreement, but to a predicate of decision that recognized the ultimate authority of parents as a presuppositional value, whatever its precise contours.

Once one moves away from this assumption and acknowledges that children have rights in the same sense, if not to the same degree, as parents do, justifying parental authority becomes problematic across a wide range of situations. It is nevertheless possible to justify some subordination of children's rights in terms of the derivative model of parental authority that such a move implies. *See* B. Ackerman, *Social Justice in the Liberal State* 146-50 (1980). The most obvious way is to think of the parental role as facilitative of the child's growth.[6] Subordination of some of the child's decisions then becomes necessary in the interest of the child's ultimate

[6]The parental role obviously is and should be facilitative of children's growth in some sense. The idea here, however, is that it would facilitate raising a child to conform to state values.

liberty. *Id.* at 148-149. Although the application of a derivative model can lead to widely varying conclusions about what kinds of parental decisions are legitimate, the social structure that comes into view when one examines the family through this lens is radically different from the traditional version. The key difference that lies at the root of any derivative model is that parental commands must be justified (just as the state must also justify its commands).

This makes sense and indeed is unavoidable if parental authority is to be limited by some theory of children's liberty. It could lead to the conclusion that a parent would have to justify such things as denying his daughter the right to play with trucks. *Id.* 151-54. Such an approach could, on the other hand, be applied to justify many of the kinds of parental decisions that we find acceptable and thereby to legitimate something like the family as we know it. The requirement of justification, together with the possibility that many exercises of parental authority that now go without challenge could be found illegitimate, makes this nonetheless a radically different approach. Indeed, "[o]ur political system . . . presupposes a social system of family units, not just of isolated individuals. No assumption more deeply underlies our society than the assumption that it is the individual [parent] who decides whether to raise a family, with whom to raise a family, and, in broad measure, what values and beliefs are inculcated in the children who will later exercise the rights and responsibilities of citizens and heads of families . . . The immensely important power of deciding about matters of early socialization has been allocated to the family, not to government." Heymann and Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B. U. L. Rev. 766, 772-73 (1973). Aside from such a presupposition, there is no way to draw a line that will foreclose challenges to even fundamental parental decisions.[7]

[7]As Columbia Law Professor Bruce Ackermann explains: "I assume that no form of primary education perfectly socializes any five

The problem, of course, is to connect such a presupposition about the family to the Constitution. There is a powerful urge to do this, for the place of the family is so deeply rooted, not only in our traditions, but in the very structure of society. *Cf. Moore v. City of East Cleveland*, *supra*. This Court has found specific substantive rights related to the family to be part of the fundamental right to privacy implicit in the due process clause of the Fourteenth Amendment. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (right to abortion); *Smith v. Organization of Foster Families*, 431 U.S. 816, 842-44 (1977) (recognizing special protection of foster parents); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (right to direct a child's schooling); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (right to marry, establish home and bring up children). More generally, this Court has found freedom of choice regarding family matters to be within the right of privacy. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384-85 (1978). However, freedom of choice is a vague and manipulable predicate for the defense of parental authority. Indeed, it can just as easily be asserted to defend a child's rights to be free of parental authority as to defend parental authority itself. *See generally Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976); *H.L. v. Matheson*, 450 U.S. 390 (1981)

(footnote 7 continued)

year old to the point where he *never* resists the demands made by his "parents" in the name of his primary culture. Resistance, in one area or another, is to be expected. And when it comes, the liberal dialogue takes a new turn. By definition, the successful product of a primary education can itself raise — albeit in a hesitant and primitive form — the question of legitimacy: 'Parent, why are you entitled to boss me around?' And once the question is asked, Rationality requires an answer. . . . A liberal political community cannot support the exercise of coercion when the only thing that can be said is that elders are intrinsically superior to younger citizens. . . ." Ackerman, *supra*, at 146-47.

Although there must be limits to parental authority,[8] if the family is to fulfill its historical function as "a latent counterweight to central authority," *see Tribe*, *supra*, at 883, the Constitution must to some extent protect parental authority as an end in itself. The derivative model, which makes parental authority contingent upon accommodation of children's liberties as defined by the state, prevents formation of a social structure that can function as a counterweight, because it models parental authority after the image of the state. Just as such parental authority will necesarily mirror the state, so the social structure that forms around it will necessarily mirror society. It might be objected that the conformity required is in precisely those areas the state considers important. While the family might therefore differ in some respects, it could not by definition differ in any important respect. The derivative model of parental authority thus adumbrates a social structure that has no clear antecedents in our culture or traditions[9] and, more important, that cannot play the critical role demanded of it by democratic theory. As this Court has noted: "Although such measures have been deliberately approved by men of great genius, their ideas touching the relation of the individual and the state, were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of this state without doing violence to both letter and spirit of the constitution." *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

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[8]Physical harm is obviously one such limit. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1944).

[9]*Compare* D.H. Lawrence's colorful insight into the sociological function of the traditional family structure: "It is marriage, perhaps, which has given man the best of his freedom, given him his little kingdom of his own within the big kingdom of the State, given him his foothold of independence on which to stand and resist an unjust State. Man and wife, the king and queen with one or two little subjects, and a few square yards of territory of their own: this, really, is marriage. It is true freedom." D.H. Lawrence, *A Propos of Lady Chatterley's Lover* 35-36 (1973).

Protection of the role of intermediate associations in democratic theory, and thus of our form of government, requires recognition of the structural dimension of liberty.[10] In a purely individualistic conception of liberty, such associations retain an outward, formal independence as separate spheres of authority; but the internal transformation exacted from them by such a conception makes their claim to independence hollow instead. If the family is the penultimate association, the church is, for constitutional purposes, surely the quintessential one. Although the traditional role of the family as an irreducible social structure in our society suggests a structural dimension to familial liberties that may be connected to the Constitution, the structural dimension of religious liberty is virtually explicit in the constitutional text.

II.

The Preeminence Of The Structural Dimension Of Liberty In Religion Clause Adjudication And The Subliminal But Constitutionally Misleading Appeal Of The Individualistic Conception In Evaluating The Constitutionality Of Ohio's Labor Regulation.

While the structural dimension of liberty seems generally to be embedded within the fabric of our constitutional system in a way that is not perhaps susceptible to precise delineation, the Constitution infuses it with a particular significance and more sharply defined character in the

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[10] *Cf. Bellotti v. Baird*, 443 U.S. 622, 638 (1977) (Bellotti II), noting that "constitutional interpretation has consistently recognized that the parent's claim to the authority in their own household to direct the rearing of their children is *basic in the structure of our society*." (emphasis supplied).

context of religious liberty. The establishment clause is the core textual provision.[11]

A. Entanglement And The Autonomy Of Religious Associations: A Structural Issue.

A claim under the establishment clause does not depend upon a showing that private religious choice has been coerced. Rather, the establishment clause guards against formation of a relationship between church and state that would compromise the institutional integrity of either. The evils against which the establishment clause protects are those that threaten to weaken this integrity, such as "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973) (*quoting Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)). The premise underlying all of the Court's pronouncements in this area is that religious autonomy must be protected as an end in itself.

This Court has indeed frequently resisted lines of thought that would have justified involvements between church and state on an instrumental theory. Perhaps the

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[11] There are, of course, structural aspects to our constitutional scheme that do not directly implicate individual liberty. For example, federalism concerns might be taken to imply a degree of state autonomy from congressional acts pursuant to the Commerce Clause, *see National League of Cities v. Usery*, 426 U.S. 833 (1976), though the numerous constitutional provisions limiting state power, as well as certain other difficulties, would appear to make the contours of this autonomy problematic. *See Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985). However this may be, such concerns raise questions unrelated to the issues discussed here. The concept of a structural dimension of liberty is much narrower, if not less important, and much more easily cabined than the concept of state autonomy. *See* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1401 n. 23 (1981) (differentiating strong constitutional basis for church autonomy from problematic basis of state autonomy).

classic statement of this Court's rejection of an instrumental approach to establishment clause adjudication is *Lemon v. Kurtzman,* 403 U.S. 602 (1971), in which this Court struck down statutes providing aid to the secular aspects of non-public schools. This Court declined to sustain the programs at issue in that case merely because they might not have had a primary religious affect. A narrow inquiry into effect would have been misdirected, for the evil of the programs arose out of the "cumulative impact of the entire relationship" that they created between church and state. *Id.* at 614. "The objective [of the establishment clause] is to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." *Id.* The teaching of this Court is, in short, that our form of government, as particularly expressed in the establishment clause, pretermits instrumental analysis of the relationship between church and state. For "[u]nder our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1983) (*quoting Lemon v. Kurtzman, supra*, at 625) (emphasis omitted). The right of religious association is, accordingly, not dependent upon attainment of any end or contingent upon conformity to any social practice or ideological view. Though the Constitution unquestionably also protects private religious choice, the structural dimension of religious liberty may well be the desideratum of the First Amendment's religion clauses. Indeed, "the core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions,' *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963)." *Larkin v. Grendel's Den, Inc.*, 459 U.S. at 126-27. As early decisions of this Court recognized, the protection of religious liberty involves protecting "[t]he structure of our government." *Id.* at 126 (*quoting Watson v. Jones*, 13 Wall. 679, 730 (1892)). That structure has "secured religious liberty from the invasion of the civil authority." *Id.* It follows that religious liberty would be compromised

by regulation of a religious association that constituted an "invasion of the civil authority" within the meaning of this Court's previous decisions, even if it could be shown that such regulation did not vitiate freedom of religious choice.

B. The Fact Of Entanglement In Ohio's Regulation Of Appellees.

The labor regulation that Ohio seeks to impose on Appellees is without question an unconstitutional entanglement of church and state. Ohio's regulation of Appellees implicates both the administrative prong of entanglement, as that doctrine has been developed and clarified in numerous school aid cases decided by this Court, and what might be termed the autonomy prong, which interdicts state interference in the doctrinal or ideological affairs of a religious association.[12] *See Dayton Christian School v. Ohio Civil Rights Commission*, 766

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[12]The entanglement inquiry does not, of course, depend upon the fact that we are dealing with a religious school and not a church proper. This Court's school aid cases establish clearly that entanglement can arise in the context of state involvement with a religious school *See, e.g., Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976). The education of its young is, in any case, an integral part of a church's mission. The attempt to develop a constitutional distinction between a church proper and a church school would at best be fraught with difficulties. Moreover, the possibility that Ohio could distinguish between secular and religious issues and thereby avoid a pretextual inquiry into the school's motives is irrelevant to the entanglement issue. As this Court observed in *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979): "The resolution of such charges by the Board, in many instances will necessarily involve inquiry into the good faith of the position asserted by Clergy-Administrators and its relationship to the school's mission. It is not only the conclusion that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also *the very process of inquiry leading to findings and conclusions.*" (Emphasis supplied).

F.2d 932, 957-61 (6th Cir. 1985). *See also Catholic Bishop of Chicago v. National Labor Relations Board*, 559 F.2d. 1112, 1120-22 (7th Cir. 1927) (reviewing entanglement issue presented by labor regulation of religious school.)

One cannot imagine a more profound example of administrative entanglement than that comprehended by the Proposed Consent Order of the Ohio Civil Rights Commission. That Order provides for "compliance reviews" of Appellees, at the discretion of the commission, over the next three years. *See Dayton Christian Schools, supra*, at 951. The purpose of the reviews is to ensure that Appellees obey the "terms and conditions" of the Order. *Id*. Even if the terms and conditions did not impinge upon Appellees' religious freedom, the "comprehensive, discriminating, and continuing state surveillance . . . required to ensure that these restrictions are obeyed," *see Lemon v. Kurtzman, supra*, at 619, and specifically contemplated by the Order would give rise to a "constitutionally intolerable degree of entanglement." *Meek v. Pittenger*, 421 U.S. 349, 370 (1975); *see also Wolman v. Walter*, 433 U.S. 229, 254 (1977)

More serious than this administrative entanglement, however, is the interference with Appellees' religious beliefs. Inasmuch as the teacher is critical to the church's mission of training its young, plenary control over who occupies that role is an essential condition to the successful fulfillment of the church's mission. *See Roberts, supra*, at 3250 (recognizing that interfering with a group's control of its membership can "impair the ability of the original members to express only those views that brought them together."). By precept and by practice, the teacher is the exemplar of the church's faith. To interfere with the church's ability to hire, discipline, and discharge its teachers is thus to interfere with the church's preaching and teaching mission.[13] If there is any inviolable principle

[13]As a general matter, interference with the internal affairs or government of a group strikes at the heart of associational freedom.

of the religion clauses, it is that the state must absolutely avoid involvement in matters touching religious doctrine. *See, e.g., Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). *See generally Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *New York v. Cathedral Academy*, 434 U.S. 125 (1977).

C. The Significance Of Entanglement From The Perspective Of Both Conceptions.

The fact of entanglement, therefore, seems clear. The more interesting question is the significance of entanglement. It is here that the choice between underlying conceptions becomes critical, for it is at this point that the value of associational freedom is called into question.

The individualistic conception, it will be remembered, views associational freedom as derivative of individual liberty. Associational authority, in this view, picks up where accommodation of individual liberty leaves off. An association has the authority to do anything that furthers its members' interests, so long as it is consistent with its members' liberties. Associational authority is *by definition* residual in the individualistic conception. Defining associational freedom and authority in this way makes the question of a conflict between individual liberty and a church's associational freedom seem a great deal easier. Because now the protection of the individual's liberty does not seem to pose a threat to the church's associational

(footnote 13 continued)

Roberts, supra, at 3250; *Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1975). The right not to associate, or to discontinue an association, is an important aspect of this freedom. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977). Indeed, "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts, supra*, at 3250.

freedom. At most, it limits the contingent authority which this model allows the church as a formal value; in pure theory terms, the conflict is only apparent, for the church's authority did not extend to deprivation of liberty in the first place. The individualistic conception thus casuistically transforms a claim to individual liberty, without more, into a limitation on associational freedom.

By contrast, from the perspective of a nonderivative model, such a claim poses a threat to the core of the church's autonomy, because it challenges the church's right to differentiate itself from the state. Such a perspective does not foreclose the possibility of a claim so weighty that even this enormous cost might have to be borne. It does suggest, however, that not all claims to individual liberty would be weighty enough to qualify as a limit on the church's authority. To hold that they were would be a definitional error under this approach, for the viability of all such claims is precisely the condition that defines the nonexistence of an independent value of associational freedom.

The nonderivative model implies, therefore, a classification of potential claims to individual liberty into at least two classes: (1) those overweening enough to justify denial of the church's autonomy, and (2) all others. It follows further that the more claims placed in category (2) the greater the value of associational freedom. While this recognition does not, of course, in itself provide a decisional rule of universal import, it does suggest why the Ohio Civil Rights Commission should not have jurisdiction over Appellees. The problem is that there is no principled basis for distinguishing sex discrimination claims from numerous other claims predicated upon statutory or constitutional norms. Ohio has not, in fact, offered any arguments to distinguish its views of sexual equality from other constitutional or statutory values it might seek to advance. To place such a claim within category (1) would thus be to assert the possiblity that virtually all claims involving constitutional and statutory norms would fall within category (1), a move tantamount

to denying the validity of the model.[14] Indeed, the state of Ohio in this case seeks to apply to Appellees, not only its views of sexual equality, but its whole statutory scheme. This is precisely what it may not do, if freedom of religious association is to have any independent meaning.

This does not mean that religious autonomy would be unlimited in a nonderivative scheme. It means' rather, that to justify an invasion of religious autonomy, the state must advance a reason transcending its general interest in constitutional norms.[15] Moreover, not every collective enterprise shares the characteristics that give associational freedom intrinsic value in our constitutional scheme. Although an instrumental analysis may warrant some

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[14]One can imagine various versions of a nonderivative analysis, differing according to the principles they employ to sort claims betwen categories (1) and (2). The strongest version would deny that all but the most extreme cases could be fitted within category (1). Yet the weakest version, if it is to affirm the basic supposition of the nonderivative model that certain associations have intrinsic value in our constitutional scheme, must nevertheless divide between categories (1) and (2) in a way that places substantial claims within category (2). The critical flaw in Ohio's scheme, from the perspective of a nonderivative analysis, is its apparent failure to treat *any* claims as category (2) claims.

[15]This Court's decisions suggest at least two types of claims that might qualify as category (1) claims: (1) claims involving physical harm to an individual, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (protecting children from physical harm of exploitive labor); *Jehovah's Witnesses v. King County Hospital*, 390 U.S. 598 (1968) (denying right of parents to withhold necessary blood transfusion from child); *cf. United States v. Reynolds*, 98 U.S. 145, 166 (1878) (asserting power of government to stop human sacrifices as part of religious ritual) (dictum), and (2) claims premised on fraud unrelated to issues of religious doctrine. *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 n. 23 (1952) (*quoting Gonzalez v. Archbishop*, 280 U.S. 1, 16-17 (1929)); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721 (1976); *cf. United States v. Ballard*, 322 U.S. 78 (1944) (constitution forbids inquiry into fraud touching religious doctrine).

protection for other kinds of collective efforts to express individual liberties, *see, e.g., Citizens Against Rent Control/Coalition For Fair Housing v. Berkeley*, 454 U.S. 90 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976), it is necessary to identify those kinds of associations with intrinsic value, whose protection therefore preserves the structural dimension of individual liberty. Associations "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship . . . reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." *Roberts, supra*, at 3250-51. By contrast, large enterprises distinguished by their commercial quality "seem remote from the concerns giving rise to this constitutional protection."[16] *Id.* at 3251.

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[16]Religious Associations such as Dayton Christian Schools exemplifys the former kind of association. The school exercises a high degree of selectivity in affiliation decisions, of which the terms and conditions of Mrs. Hoskinson's contract are a good example, and maintains seclusion from others in regard to religious doctrine. Although the school is also relatively small, and smallness may often be an attribute of such associations, it is primarily the schools' sharply defined ideological character that sets it apart from one whose authority may be defined instrumentally. *Cf. Roberts, supra*, at 3258 (O'Connor, J., concurring), (drawing distinction between ideological and commercial associations). A distinction between ideological and commercial associations must inevitably be an important element in the definitional calculus that parses associations with intrinsic value from other forms of association. *Hishon v. King & Spalding*, 104 S.Ct. 2229, 2236-37 n. 4 (1984) (Powell, J. concurring). One hears the echo of this distinction in this Court's explications of the difference between commercial and political speech. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562-63 (1980); *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265, 2274-75 (1985). Involvement in commercial activity tends to dilute the affiliational quality that gives associational autonomy constitutional value. *Runyon v. McCrary*, 427 U.S. 160, 172 n. 10. (1976) (discussing commercial character of private school); *Norwood v. Harrison*, 413 U.S. 455 (1973). Obversely, protecting associational activities of a commercial character would seriously

In sum the nonderivative model implies a high degree of autonomy for certain kinds of associations. It does not of course imply absolute autonomy for any association, nor does it imply a substantial measure of autonomy for all associations. It does imply for associations with intrinsic value in our constitutional scheme, such as religious associations, a degree of autonomy that would foreclose the general imposition of constitutional norms upon their affairs.

Thus, Ohio's statutory scheme, which impliedly asserts the general applicability of public norms to associations such as Appellees, would fail to pass muster under even a weak version of nonderivative analysis. This demonstrates that, if there is a powerful intuitive appeal to the idea that schools such as Appellees should not be allowed to violate public norms, it is the appeal of a conception that does not recognize the intrinsic value of such associations. It is, in short, the appeal of a purely individualistic conception. This is not to say that all those moved by that appeal would consciously affirm the individualistic conception, or deny the abstract proposition that such associations have intrinsic value. Indeed, an important factor contributing to the appeal of the individualistic conception is that it appears to accommodate associational freedom and authority even while it is denying them anything but a dependent and instrumental role. When one pierces beneath the veneer of this imagery and examines the underlying logic of the individualistic conception, its pretension to recognition of limited associational authority evaporates. In its place, one then sees the complete contingency of associational freedom, and hence a projection of a society utterly alien to American constitutionalism.

(footnote 16 continued)

impede efforts to combat employment discrimination in society generally. *See Runyon, supra*, at 174 n. 11. Appellees Dayton Christian Schools, however, conspicuously lack this commercial character.

D. The Necessity Of Denying The Jurisdiction Of The Ohio Civil Rights Commission To The Preservation Of The Structural Dimension Of Religious Liberty.

The seeming strength of Ohio's position has its roots in a purely individualistic conception of liberty. Once the intrinsic, nonderivative aspect of liberty — what we have termed the structural dimension of liberty — is recognized, it becomes clear that, apart from a unique justification, constitutional norms cannot be imposed on religious associations without doing violence to constitutional values. Whatever its value as a political theory, the individualistic conception underlying the State of Ohio's position is foreign to our system of government. As Professor Tribe has aptly observed:

> It is not only the sanctity of religious conscience in the abstract which has been of concern [in cases raising questions of religious autonomy]; it has also been the integrity of religious associations viewed as organic units. Recognition of the principle that associations have rights different from those of the persons constituting them has been somewhat grudging in American constitutional law. But one sphere in which such recognition has been clear is that of religious organizations and their autonomy.

Tribe, supra, at 876.

CONCLUSION

We live in an age when the state assumes it has an all-pervasive authority to intervene in virtually all phases of life. While the state obviously has, in some cases, valid reasons for its conduct, such is not true in the present case.

The issues involved in this case go further than the intervention involved. Indeed, the very nature of religious freedom and American constitutionalism are threatened.

Protection of Appellees' religious autonomy requires

that the jurisdiction asserted by Appellant be denied. The decision of the court below must, therefore, be affirmed.

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF OF CONCERNED WOMEN FOR AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF CONCERNED WOMEN FOR AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICUS

Concerned Women for America is a national non-profit women's organization of over 500,000 members. The members of CWA strongly support and share the traditional, Judeo-Christian values of the Dayton Christian Schools (DCS), appellees in this case. The members of Concerned Women for America are in large part from the conservative evangelical-fundamentalist churches that

will be most directly affected by the outcome in this case. Our membership includes a number of women who teach in church-related schools which have religious convictions similar to Dayton Christian Schools.

The Ohio Civil Rights Commission, by its actions, seriously attacks two of our central religious convictions: the power of parents to oversee the education of their children, and the role of women. The state imposes a chillingly burdensome choice on the Christian school: surrender your convictions, or feel the full fury of the state's police power.

Many members of CWA send their children to private Christian schools. They believe the Bible requires them to oversee their children's education. These Christian parents want their children in an environment immersed in Biblical truth and Godly character.

Character development stands as one of the main pillars of Christian private school education. Christian parents want their children to become honest, diligent, and responsible individuals. Above all, parents want their children to honor and respect the reputations of others, to stand by their promises and to respond rightly to authority.

The state is trying to force the Christian school to compromise and abandon its convictions on dispute-resolution, and dealing with authority, among others, in this case. The Christian school should not be forced to rehire a woman whose actions contradict the religious convictions of the school. The school's mission to impart Christian character suffers if one of the teachers, a role model for the children, can spurn these values and still remain employed.

Also, the Ohio Civil Rights Commission attacks a second major religious conviction of the church school, shared by the members of Concerned Women for America: that women with young children should not work outside the home, but focus on raising their children.

The state misses the importance of this religious conviction by claiming it is merely enforcing a criminal law against sex discrimination. This analysis fails to recognize the importance of the religious conviction in question.

CWA members share the belief with Dayton Christian Schools that the Bible teaches women with young children should not work outside the home. The disintegration of the American family is due, in part, we believe, to the fact that women with small children frequently work outside the home. This brief is filed with the consent of the parties. Letters of consent accompany the filing of the brief pursuant to Rule 36.2.

I.

THE RELIGIOUS CONVICTIONS AT STAKE ARE SUBSTANTIAL

A. The Bible Commands Parental Responsibility for Education

The religious purpose of the Dayton Christian Schools is a reflection of the Biblical mandate and command to fathers to bring up their children "in the discipline and instruction of the Lord." (Ephesians 6:4). In *Dayton Christian Schools, Inc.* v. *Ohio Civil Rights Commission*, 766 F.2d 932, 937 (6th Cir. 1985), the court stated that "[t]estimony in the district court indicated that the parents' obligation to educate their children in accordance with Christian principles is biblically based."

The lower court described the testimony of the Superintendent of DCS who referred to the command of Deuteronomy 6:5-7:

> And you shall love the Lord your God with all your heart and with all your soul and with all your might.
>
> And these words, which I am commanding you today, shall be on your heart; and you shall teach them diligently to your sons and shall talk of them when you sit in your house and when you walk by the way and when you lie down and when you rise up.

766 F.2d at 937, n.9 [1]The mission of DCS is to help parents fulfill their Biblical command. *Id.*

The state of Ohio fails to appreciate the fact that the Christian beliefs of the school officials and parents involved permeate every aspect of their lives. For example, the state of Ohio argues that DCS provides "secular education as well as religious instruction. DCS, therefore, falls at the intersection between purely religious and purely secular activity." (Brief for Appellants, p. 17).

The state of Ohio states that it "recognizes the constitutional right of religious employers to discriminate in the area of religious worship and instruction. Since DCS crosses into the secular realm, however, the state properly may act on discrimination occurring in its schools." *Id.* at 18. However, the whole concept of Christian education embodies the idea of religious worship and instruc-

[1] Superintendent Schindler testified that Deuteronomy 6:5-7 "indicates very strongly to us that there can be no separation between secular and sacred. We believe that all truth comes from God." In John 14:6, Jesus said "I am the way, and the truth, and the life; no one comes to the Father, but through Me." Thus, as Superintendant Schindler stated it, God is "the center of all aspects of learning and everything that's God's." 766 F.2d at 937, n. 9.

tion. As Superintendent Schindler testified, there is *no* differentiation between secular and sacred.

In cases involving state aid of various forms to religious schools this Court has rejected attempts to allow funding on the theory that the teacher's function can be separated into religious and secular categories. This Court has repeatedly held that the teaching in religious schools cannot be dichotomized between secular and religious components for constitutional purposes. The basic purpose of the school is to integrate the two.[2] *Lemon* v. *Kurtzman*, 403 U.S. 602, 618-619 (1971); *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975); *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 480 (1973); *Grand Rapids School District* v. *Ball*, 473 U.S. ___, ___ (1985).

Thus, in this context there is no differentiation between matters "of purely ecclesiastical concern" such as "church governance, religious ritual, worship and spiritual leadership" and "secular education." (Brief for Appellants, p. 17). None of the activities of DCS can be characterized as secular. They all involve "religious instruction."

B. Chain of Command Principle

According to the lower courts the first religious belief burdened by the state was that of the principle of the

[2] For example, one of the plaintiffs, a teacher at the school, Paul Pyle, testified that he begins each class with a prayer and that "for instance, when we are studying any literature, the thing I stress with my students in literature is all human thought can be tested within the absolute standards of the Scriptures. . . . And you can see that my putting the Scripture up as the ultimate authority comes through in the classroom day after day." 766 F.2d at 937-8. Simply by teaching subjects that other non-religious schools teach does not bring DCS into a more secular realm. As Superintendent Schindler put it, "God himself is the center of all aspects of learning and everything that's God's." *Id.* at 937.

Biblical chain of command or giving a good report. Mrs. Hoskinson's contract included a provision that "[t]he teacher agrees to follow the Biblical pattern of Matthew 18:15-17[3] and Galatians 6:1[4] and always give a good report. All differences are to be resolved by utilizing Biblical principles—always presenting a united front." (Joint Appendix, p. 61).

In addition, the lower court pointed out that Mrs. Hoskinson "wrote on her application for employment that '[o]bedience to those in authority over you is clearly stated in the Bible. I believe in God's chain of command.'" 766 F.2d at 940.[5]

The chain of command principle as practiced by the Dayton Christian Schools is clearly stated in Scripture and emphasized throughout the employment process and in day to day activities of the teachers. The teachers sign a document twice a year stating their commitment to this

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[3] "And if your brother sins, go and reprove him in private; if he listens to you, you have won your brother. But if he does not listen to you, take one or two more with you, so that by the mouth of two or three witnesses every fact may be confirmed. And if he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax-gatherer." Matthew 18:15-17.

[4] "[B]rethren, even if a man is caught in any trespass, you who are spiritual, restore such a one in a spirit of gentleness; each one looking to yourself, lest you too be tempted." Galatians 6:1.

[5] Superintendent Schindler testifed that "[t]he way the Scriptures teach, the way we are to love God is by our obedience. And we know the Scriptures teach that in obedience, there's certain authority structures that He has established. And we feel that it's important that each teacher recognizes the authorities that have been placed over them, as well as we expect the students to recognize the authority the teacher has over them. . . ." 766 F.2d at 939.

principle. (Joint Appendix, p. 47-8). In addition, teachers are asked to keep a card on their desk with a reminder of that principle. (Joint Appendix, p. 47). "Principle of Good Report" appears on a document entitled "Daily Self Checklist for All Staff Members of DCS." (Joint Appendix, p. 54).

Obedience to authority through the chain of command according to the Scriptures provides an orderly manner of resolving disputes, avoids the dangers of gossip and slander and teaches Christians how to obey and love God. This is a fundamental character trait that the school seeks to instill in students to check the character deficiency of rebellion to authority. The "chain of command" also has the pragmatic value of settling disputes at an early stage and checking sinful behavior.

C. Mothers at Home Principle

The trial court found that the second religious belief burdened by the state in this case relates to the principle that mothers of young children should care for them at home. 578 F.Supp. 1004, 1031 (S.D. Ohio 1984).

The basis for the belief is found in Scriptural passages that include 1 Peter 3:1-9, I Timothy 2:9-15 and Titus 2:1-15. 578 F.Supp. at 1011. Titus 2:3-5 states:

> Older women likewise are to be reverent in their behavior, not malicious gossips, nor enslaved to much wine, teaching what is good, that they may encourage the young women to love their husbands, to love their children, to be sensible, pure, workers at home, kind, being subject to their own husbands, that the word of God may not be dishonored.

This belief was the one which led to the decision by the school not to renew Mrs. Hoskinson's teaching contract. 578 F.Supp. at 1011 and 1011, n.4.

In addition, Ephesians 5:22-33 describes the marriage relationship. Ephesians 5:23-25 states:

> For the husband is the head of the wife, as Christ also is the head of the church, He Himself being the Savior of the Body.
>
> But as the church is subject to Christ, so also the wives ought to be to their husbands in everything.

From these Scriptures DCS believes that it is clear that God has ordained different roles and offices for men and women. As Superintendent Schindler testified, "'[w]e believe that the Bible teaches that even though we are equal in the sight of God, our role is different, the role of the female is different than that of the male." 578 F.Supp. at 1011.

As an example, the court referred to Art. IV, § 1 of the Parent-Teacher Fellowship Constitution that provides:

> This Fellowship believes that God has clearly established the husband/Father as the spiritual leader of the home and, as such, preserves the offices of the President and Vice President for men fulfilling their spiritual leadership responsibilities.

766 F.2d at 939, n. 11.

The importance the school places on Christian principles being upheld by the staff runs throughout the employment practices and the documents of the DCS, many of which are included in the Joint Appendix. Thus, if students see a role model violating fundamental Scriptural beliefs, the entire purpose of providing a Christian education is thwarted. If Mrs. Hoskinson returned to teaching with a newborn baby at home, the childrens' faith and commitment would be severely tested. The teaching of parents and other religious authorities including pastors would be undermined.

Although students learn that the world's practices are different because all men are sinners, a focus of the Christian education is to insure that believers adhere to the Scriptural command stated in Romans 12:2, "[a]nd do not be conformed to this world, but be transformed by the renewing of your mind, that you may prove what the will of God is, that which is good and acceptable and perfect."

The school's demands on its staff to attend church and adhere to Scriptural principles in all aspects of their personal lives and conduct is a reflection of the Biblical command described in the Preamble to the school's Constitution that fathers (and, implicitly, mothers) are "to train children in the nurture and admonition of the Lord. (Ephesians 6:4)."(Joint Appendix, p. 5). Putting a teacher with a baby at home in the classroom, in direct conflict with the religious convictions of the parents, completely destroys the free exercise of religious beliefs of those involved. The state of Ohio contends that "[t]he command of the school that Mrs. Hoskinson stay at home with her children was an attempt to deprive Mrs. Hoskinson of her personal freedom to raise her children as she wanted." Brief for Appellants, p. 26. Clearly, Mrs. Hoskinson is free to find another job if, after leaving DCS and having a baby, she so desires. The school cannot be said to be depriving her of her personal freedom.

Although not all parents in the school may follow an agrarian life style that characterized the Amish in the case of *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this case parallels *Yoder*. The Court in *Yoder* described the "strong evidence of a sustained faith pervading and regulating respondents' entire mode of life." 406 U.S. at 219. Similarly, in this case, the entire record demonstrates the strong Scriptural foundation to everything that the Dayton Christian Schools believe, practice and teach.

The Court in *Yoder* held that "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* Similarly, here, imposition of a state civil rights policy of requiring a Christian school to retain a mother of young children as a teacher in violation of Biblical command would destroy the free exercise of respondents' religious beliefs.

In *Yoder*, the Amish

> convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.

406 U.S. at 235. In this case, the testimony and documents overwhelmingly demonstrate the sincerity of the religious beliefs of those involved with the Christian school. They also show how these beliefs are related to their daily lives both in and outside the classroom and how the beliefs are so central to their lifestyles. The record also demonstrates how devastating the effect of a state statute outlawing sex discrimination is upon the internal management and conduct of a private institution. The hazard of the state's enforcement is the complete destruction of the purpose of operating a Christian school in the first place, the destruction of the distinction between public and private institutions and the destruction of the religious convictions of many Americans.

II.

THE OHIO LAW INFRINGES UPON THE PARENTS' RIGHTS TO EDUCATE THEIR CHILDREN AND TO FREE EXERCISE OF THEIR RELIGION

Free exercise of religion stands high in the constellation of fundamental constitutional rights. Therefore, on a showing that the state has infringed upon the right to free exercise of religion, the state must demonstrate a compelling state interest to justify the policy and that it is the least restrictive means to achieve the government objective, *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981).

Both the District Court and the Sixth Circuit found the religious beliefs of the Dayton Christian Schools sincere, and all-pervasive, 766 F.2d at 936. Earlier sections of this brief demonstrate how important and central those religious convictions are to the people of Dayton Christian Schools, and other like-minded individuals, including the amicus.

The attempt by the Ohio Civil Rights Commission to exercise jurisdiction over the Dayton Christian Schools raises grave constitutional questions. Although the Sixth Circuit held that the state has a compelling state interest in eradicating sex discrimination, the state's methods of enforcing its interest seriously infringed on the schools' free exercise rights:

> Our conclusion that the OCRC's exercise of jurisdiction in this case is extremely burdensome on appellants' exercise of religion is significantly influenced by the affirmative and highly coercive nature of the state interference. The hallmark of a free exercise violation is the presence of coercion by the state.
>
> 766 F.2d at 949

The state interest being asserted by the Commission is the interest to regulate the ways churches and religious schools think and act. The Ohio Civil Rights Commission, in effect, wants to ensure that religious school doctrines and practices conform to state public policy. This onerous state interest obviously infringes on the parents' and schools' free exercise of religion.

The magnitude of the Ohio Civil Rights Commission's coercive intrusion into the domain of the parents' power over their children's education and the Dayton Christian Schools' religious practices becomes vividly apparent upon examing the Commission's actions in the matter.

For example, the Commission sent a letter to the school on May 14, 1979. In the letter, the Commission ominously wrote:

> [W]e encourage you to reconsider adjustment of this matter in lieu of a potentially costly and time consuming investigation.
>
> Joint Appendix, p. 80.

What can this statement mean to the school but "give up your religious practices or suffer the wrath of the state?" The Commission compels religious compliance in a sophisticated and odious fashion. The Sixth Circuit described the Commission's use of its investigative power in this case and the letter quoted above:

> The Commission, in fact, early in the case used its investigative powers and asserted jurisdiction as coercive tools to compel appellants to relinquish the mandates of their consciences.
>
> 766 F.2d at 951.

The Ohio Civil Rights Commission demanded a frightening amount of scrutiny. The state demanded that the Christian school produce employment data on Linda Hoskinson, blank teacher application forms used by the school, employee handbooks, rules and regulations, written school policies on the following: disciplinary actions, employee pregnancies, oral and written performance evaluations, performance standards, employees working with pre-school children, contract renewal, employee grievance procedure, employees resorting to the legal

system in grievances with the school, determination of "serious philosophical differences, inquiries into employees' financial status and babysitting plans, as well as complete job descriptions, model contracts, a list of all pregnant employees suspended or discharged during a certain period of time, and the reasons why they were suspended or discharged, minutes of the Board of Directors' meeting for two dates, complete personnel files on at least 14 people, and any more who had been suspended or discharged from employment, and also have a number of witnesses available for questioning by the Commission, (Joint Appendix, p. 81-3).

The Commission's proposed Conciliation Agreement and Consent Order (Joint Appendix, p. 94), also clearly demonstrates immense state coercion of the Christian schools.[6]

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[6] In the Consent Order, the state dictated, in summary, the following as a settlement to this matter:

1. The school agrees to obey Ohio law and agrees *not* to seek information about religion on the employment application, "unless a bona fide occupational qualification is certified in advance by the Commission."
2. The school agrees that the Ohio Civil Rights Commission has "full and complete jurisdiction" over the parties and the subject matter.
3. The school must reinstate Linda Hoskinson.
4. The school must reimburse her backpay at 6% interest, and this must be paid to the Commission within 30 days after the Consent Order takes effect.
5. The school will not discuss the matter, and will expunge this matter from Linda Hoskinson's records. The school will not retaliate against Linda Hoskinson.
6. The school will post the Commission's mandatory notice, which states that certain types of discrimination are illegal under Ohio law.
7. The school must write specific guidelines for employee pregnancy

The state's massive intrusion upon the school infringes the Free Exercise Clause. The parents with strong religious convictions virtually lose their power to send their children to a school where Biblical values are taught, and appropriate teacher role models conduct the classes. The school must worry that any teacher dismissed because of the religious convictions in question will also file a complaint with the Ohio Civil Rights Commission.

The Commission states in effect, "you can teach and practice religious convictions, unless they conflict with the ideas of state." As the Sixth Circuit observed, "This parental interest is particularly compelling combined with a free exercise claim," 766 F.2d at 947.

This Court expressed abhorrence with state coercion of ideas in a religious setting in *West Virginia* v. *Barnette*, 319 U.S. 624 (1943):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> 319 U.S. at 642.

The Christian school in this case does not seek protection of a religious conviction that violates public policy and afffects society at large, such as human sacrifice or polygamy, *Reynolds* v. *United States*, 98 U.S. 145 (1879). Nor is this a case in which the government is attempting to

---

and home child care, and supply these guidelines to the Commission within 60 days.

Joint Appendix, p. 94-18.

eliminate state financial aid for a religious practice it disagrees with, such as in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983).

In *Bob Jones*, the Court upheld the power of the Internal Revenue Service to eliminate the tax exempt status of Bob Jones University because it did not permit interracial dating. The government sought to sever its tax break, so that it would not be "subsidizing discrimination."

The ruling in *Bob Jones* instructs the Court for the case at bar. In *Bob Jones*, the government desired to separate itself from the activities of Bob Jones University, although the school was free to retain its interracial dating policies, but without tax exempt status. In the present case, the Ohio Civil Rights Commission desires to prohibit the school from acting upon its religious convictions, and will enforce its prohibitions if necessary. The action in *Bob Jones* financially hurt the institution, but did not totally forbid the school from practicing its convictions on interracial dating. In the present case, the school will be forced by legal mandate to act against its religious convictions. 578 F. Supp. at 1020.

The actions of the Ohio Commission logically will lead to lawsuits against religious institutions, such as the Roman Catholic Church, that refuse to ordain women. The Ohio Civil Rights Commission (vehemently) denies this, and attempts to draw a distinction between the pastors or priests of a church, and the teachers of a religious school. The Commission says it can regulate religious school teachers, but not pastors of a church.

As previously noted, this Court has consistently held that teachers in religious schools cannot be characterized as secular for constitutional purposes. See p. 5 and cases cited thereat.

No significant constitutional difference exists between these two situations. The Dayton Christian Schools were established to teach Biblical values and Christian character. The Roman Catholic Church was established to worship and serve God. The leaders of Dayton Christian Schools have a religious conviction that women with young children should not work outside the home. The leaders of the Roman Catholic church have a religious conviction that women should not be ordained as priests. If the religious convictions of the Dayton Christian Schools can be swept aside to punish sex discrimination, then so can the religious convictions of the Roman Catholic Church. No significant legal distinction exists between those two cases.

The coercive efforts by the Ohio Civil Rights Commission severely interfere with the parents' right to oversee their childrens' educations, and the religious convictions of the parents and school leaders. The state has not demonstrated that its course of action is the least restrictive means to promote its state interest. The state's actions do not accommodate the religious beliefs of the school. The clear principles of the Free Exercise Clause demand that the Dayton Christian Schools be allowed to function without state interference in this area.

III.

THE ACTIONS OF THE OHIO CIVIL RIGHTS COMMISSION VIOLATE THE ESTABLISHMENT CLAUSE

The Ohio Civil Rights Commission clearly violates at least one prong of the three-part Establishment Clause test articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). No one in this case argues that the Ohio Commission's actions or the relevant state laws lack a secular purpose or have the primary effect of promoting religion. But

the Sixth Circuit found that the Commission's actions excessively entangle the government with religion, and this is constitutionally prohibited by the Establishment Clause.

The Sixth Circuit found that the religious permeation of the Dayton Christian Schools meant that state intervention would likely result in a high degree of entanglement. Second, since the state seeks to affect teacher employment, the state must necessarily become involved in regulating the ideology and theology of the school. Third, the Commission seeks ongoing oversight of the school to ensure compliance with its consent decree. This is not a one-time church-state encounter (766 F.2d at 958).

The 7th Circuit Court of Appeals ruled in a parallel setting that the National Labor Relations Board could not exercise authority over the teacher-labor disputes at a religious school. In *Catholic Bishop of Chicago* v. *NLRB*, 559 F.2d 1112 (7th Cir. 1977) *aff'd on other grounds*, 440 U.S. 490 (1979), the court said:

> We are unable to see how the Board can avoid becoming entangled in doctrinal matters, if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.

559 F.2d at 1125.

The list of documents requested by the Commission from the school, the ongoing monitoring for compliance, the posting of state regulations, all point to excessive state entanglement with the religious school.

The Ohio Civil Rights Commission has asserted that the Constitution only prohibits excessive entanglement of the sovereign in religious activity, not secular functions, such as teacher hiring. (Brief for Appellants, p. 33.) This is wrong on two counts. First, the school hires teachers based on their Godly character and adherence to Biblical principles. Teacher hiring is not a "secular function" of the school.

Also, "[t]he statute in this case, as applied by the OCRC, clearly operates to discourage the practice of religious belief." 766 F.2d at 961. The state is saying that its views on sex discrimination must prevail over the schools' views. This is state-enforced orthodoxy of a new, but pernicious kind.

If the Establishment Clause sets a "wall of separation between church and state," it means that church and state each exists in separate realms. Church and state have some interaction, but this Court has said one must not become "excessively entangled" with the other.

Therefore, state interference in the hiring and firing of teachers at Dayton Christian Schools creates an impermissible entanglement between church and state. The state's interest is not significant enough to permit this entanglement. It is indeed excessive, and should not be permitted.

CONCLUSION

The Ohio Civil Rights Commission has unconstitutionally usurped power over the Dayton Christian Schools by thrusting itself into the teacher hiring practices of the school. This action violates both the Establishment and Free Exercise Clauses of the First Amendment. This Court should affirm the ruling of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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February 5, 1986

AMICUS CURIAE

BRIEF

Supreme Court U.S.
FILED
FEB 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-488

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OCTOBER TERM, 1985

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v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE LUTHERAN CHURCH-MISSOURI SYNOD, AND THE CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE SUPPORTING APPELLEES

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QUESTION PRESENTED

Whether a state may compel a private religious school and the parents of students attending that school to violate their sincerely held religious beliefs by requiring the school to continue to employ a teacher who acts contrary to those religious beliefs.

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INTEREST OF THE AMICI CURIAE

The American Jewish Committee, a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the American Jewish Committee's conviction that the civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, the American Jewish Committee strongly supports the First Amendment principle of separation of religion and government, which is encapsulated in both the Establishment Clause

and the Free Exercise Clause. One corollary of this principle is that only when justified by the compelling interests of society may the state bar a faith group from carrying out a practice dictated by its religious beliefs. Such compelling interests, we believe, are not present in the case at bar.

The Christian Legal Society is a non-profit professional association of 3,500 Christian judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual citizen's respect for, and allegiance to, our constitutional government.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The congregations of the Synod operate approximately 1,700 elementary and secondary schools situated in most of the states of the United States. The congregations of the Synod operate more elementary and secondary schools in the United States than any other Protestant denomination. The Synod, on behalf of its congregations, schools, and individual members, is concerned about the impact of religious principles on employment matters.

SUMMARY OF ARGUMENT

Dayton Christian Schools is a pervasively religious organization whose purpose and mission is the education of children in a thoroughly religious manner and environment, in accordance with the directives of parents exercising their constitutional rights to seek a religious upbringing for their children. See *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). The State of Ohio seeks to investigate, surveille, regulate, monitor, and prescribe the employment practices of Dayton Christian Schools in the core area of its religious mission: the standard of conduct required of its teachers. In a religious school, the teacher is not solely an academic instructor but a religious role model for the students, their spiritual mentor, and the embodiment of the religious beliefs of the school, its sponsoring faith, and the students' parents. See *National Labor Relations Board* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

The state may not compel a private religious school and the parents of students attending that school to violate their sincerely held religious beliefs by requiring the school to continue to employ a teacher who acts contrary to those religious beliefs. The Free Exercise Clause of the First Amendment and the correlative Establishment Clause, forbidding state regulation that creates an excessive entanglement with religion, prohibit the state's intrusion into the heart of the religious school's mission.[1]

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[1] While appellees have asserted separate claims of overbreadth, violation of the Free Exercise Clause, and violation of the Establishment Clause, these seem but different ways of stating a single claim involving pervasive and far-reaching infringement of appellees' religious liberty. As in other decisions of this Court involving governmental interference with the institutional autonomy of religious organizations, *amici* believe it is better to speak in terms of a "First Amendment violation" than to compartmentalize the issue into "Free Exercise" and "Establishment" components. *See, e.g., Jones* v. *Wolf*, 443 U.S. 595 (1979); *Catholic Bishop of Chicago*, *supra*; *Dayton Christian Schools* v. *Ohio Civil Rights Commission*, 766 F.2d 932, 956 (6th Cir. 1985) ("the Free Exercise and Establishment Clauses are but two aspects of one essential freedom").

The excessive entanglement principle—indeed, the whole notion of separation of church and state—expressly serves free exercise values of religious autonomy and independence. See *Catholic Bishop*, 440 U.S. at 502; *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970). *See generally* Esbeck, *Establishment Clause Limits on*

This Court has repeatedly held that the state has *no* valid interest, let alone a compelling one, in regulating matters pertaining to religious doctrine, discipline, polity, internal administration, or procedure. *See, e.g., Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church* v. *Hull Church*, 393 U.S. 440 (1969); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Watson* v. *Jones*, 13 Wall. 679 (1872). Dayton Christian Schools is a pervasively religious institution whose mission is the education of its students in strict accordance with the religious views of its sponsoring churches and the students' parents. Vital to this mission is the maintenance of a particular type of religious atmosphere, mandating that instructors' beliefs and practices be in accord with the religious principles which Dayton Christian Schools seeks to transmit. The State of Ohio, through its Civil Rights Commission (OCRC), seeks to regulate Dayton Christian Schools in the core area of its religious mission, teaching, a process which involves substituting the state's secular legal norms for the religiously-based doctrine, discipline, and procedures of a sectarian community. State interference with the internal decisions of a private religious organization respecting the conformity of its members and leadership to religious doctrine, rules, and policy is particularly troublesome when the religious activity at issue is the religious education of the next generation.

The state in the present case is not seeking to assert its interest in the physical health and safety of the students through its zoning provisions or its interest in a citizenry possessing basic skills necessary to participate in the political process. Instead, it asserts an overriding interest in the hiring and firing decisions of private reli-

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Governmental Interference With Religious Organizations, 41 Wash. and Lee L. Rev. 347 (1984); Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981).

gious schools, decisions at the very core of the religious school and critical to its ability to carry out its mission. Notwithstanding the state's strong general interest in preventing sex discrimination in society at large, that interest may not operate so as to work an intrusion into the most fundamental operations of a religious institution.

Moreover, even if a compelling state interest were demonstrated, state policies that burden religious liberty must use the least restrictive means to accomplish the compelling interest. That is, the state must not use such "comprehensive, discriminating, and continuing" state surveillance or direction as to excessively entangle church and state. *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). The attempted exercise of jurisdiction by the OCRC in this case runs afoul of this requirement also. The law under which the OCRC justifies its interference is expansive in its purported scope of authority over religious institutions, forbidding discrimination on the basis of *religion*, as well as sex. In addition to such facial overbreadth, the OCRC has already intruded on the institutional autonomy of the religious school with far-reaching demands for documents and statements concerning the religious basis for Dayton Christian Schools' personnel decisions, a proposed order requiring reinstatement of the teacher in question, and repeated compliance reviews at any time for the next three years. It is difficult to think of a more comprehensive and continuing state surveillance of a religious institution in the core area of its religious mission.

Religious schools are the safety net of religious parents, if and when public schools become so thoroughly secularized that the parents cannot in good conscience send their children to those schools. However, the State of Ohio would obliterate this safety net. Not only does the state lay claim to the education of children when they are placed by their parents in public schools, but

it lays claim to their education when parents have exercised their constitutionally protected right to place their children in religious schools.

The breadth of the state's claim in this case is alarming. Were it not for the allegation of sex discrimination, the correct resolution of this case would be a foregone conclusion. Dayton Christian Schools may or may not be correct in its interpretation of the Bible regarding employment of women who have preschool children. However, the First Amendment protects the freedom of a religious school and religious parents to practice their religious convictions in hiring the teachers who are the role models for their children.

ARGUMENT

I. THE FIRST AMENDMENT FORBIDS STATE INTERFERENCE WITH, AND ENTANGLEMENT IN, THE DECISIONS OF A RELIGIOUS SCHOOL RESPECTING THE CONFORMITY OF ITS TEACHERS TO RELIGIOUS DOCTRINE, DISCIPLINE, AND ADMINISTRATION.

The employment decisions of Dayton Christian Schools fall wholly within the ambit of the religious jurisdiction, since they involve matters of religious doctrine, discipline, and internal governance. Furthermore, OCRC's attempted regulation is overinclusive, intrudes deeply into matters of religious discipline and governance, and creates a continuing and pervasive entanglement of government in the day-to-day operations of a religious institution.

The premise underlying the OCRC's efforts to supervise and control the employment practices of Dayton Christian Schools is that the employment relationship between teacher and religious organization in a religious school is hardly different from any other employer-employee relationship. This premise is plainly wrong. As this Court has stated, "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school." *Catholic Bishop*, 440 U.S. at 504.[2] Religious education is a pervasively religious activity which is afforded the highest degree of constitutional protection. See *Yoder*, 406 U.S. at 213-14, 233-34; *Pierce*, 268 U.S. at 534-35.

The *raison d' etre* of Dayton Christian Schools, like that of many other religious schools, is "the propagation of a religious faith." *Catholic Bishop*, 440 U.S. at 503, *quoting*, *Lemon*, 403 U.S. at 628 (Douglas, J., concurring). This Court has confirmed that:

> The very purpose of many of these schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. . . . '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.'

Meek v. *Pittenger*, 421 U.S. 349, 366 (1975), *quoting*, *Lemon*, 403 U.S. at 657 (Brennan, J., concurring).

As the district court specifically found, religious considerations govern the entire teacher selection process and

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[2] The fact that Dayton Christian Schools is not run by a particular denominational hierarchy, but rather by an association of like-minded Christians representing different church congregations, does not distinguish this case from this Court's precedents. The First Amendment's protections are not restricted to particular forms of church polity or organizational structure.

Moreover, were the existence of formally constituted religious authority a requisite of First Amendment protection, it certainly exists in the present case. Article V, Sec. 1A of the Dayton Christian Schools' constitution provides that the Board of Directors shall "[s]erve as spiritual leaders of the Corporation, waiting upon God for His direction and wisdom." J.A. 11.

form the basis for the parents' entrustment of their children's education to the school. 578 F. Supp. at 1018-19. The Dayton Christian Schools' teacher's manual describes the goals and objectives of "teacher models who are themselves born again and have this perspective on life" and who "serve the parent in fulfilling their responsibility of educating the child." J.A. 31. With striking emphasis, the teacher's manual first describes Dayton Christian Schools' objectives for the spiritual and moral growth of the students, then its objectives for their personal and social growth, and then its objectives for their academic development, with the religious beliefs of Dayton Christian Schools molding each set of objectives. J.A. 32-35. According to the teacher's manual, the importance of each teacher's life as a model of Dayton Christian Schools' religious beliefs outweighs even the teacher's verbal instruction to the students. Teachers are expected "to practice what they preach", or in the words of the manual: "*As our lives and thoughts* thus become integrated spiritually, we will be enabled to naturally, without straining, convey [God's truth] to the students." J.A. 36 (emphasis in original).

In this respect, the primary purpose of religious schools, the propagation of a religious faith, is indistinguishable from the purpose of churches or other religious communities. As the court of appeals noted in this case, the precise nature of the religious interests present in schools as opposed to churches may differ, but it is the nature of the religious *interests*, not of the religious *institution*, that forms the relevant inquiry.[5] 766 F.2d at 938 n.10.

[5] This Court's decision in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), supports this view. The distinction drawn in *Bob Jones* between churches and religious schools, *id.* at 604 n.29, does not suggest that different constitutional rules obtain for the two in *all* circumstances. On the contrary, this Court applied the standard requirements of "compelling state interest" and "least restrictive means." Rather, this Court appeared to emphasize the unique history of racial discrimination in education as crucial to its holding.

Amici believe that the unique history of racial oppression in this nation provides the justification for the principle enunciated in *Bob Jones*. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution followed our nation's bloody Civil War, fought in substantial part over the injustice of slavery. The history of racial segregation in education is testimony to the recalcitrance of those who would resist constitutional principles of such moment. This unique history underpins the finding that racially discriminatory schools could be no matter of purely private cognizance, but "'exer[t] a pervasive influence on the entire educational process.'" *Id.*, *quoting*, *Norwood* v. *Harrison*, 413 U.S. 455, 469 (1973).

It is also important to remember that the issue in *Bob Jones* was whether the government could deny tax exempt status to an institution which denied admission to those engaged in interracial dating. The school was left to observe its religious beliefs but without tax exempt status. *Bob Jones*, 461 U.S. at 603-604.

The First Amendment's limits on government power to abridge religious liberty are obviously not dependent on that liberty being exercised within the confines of an institutional synagogue or church. *See, e.g., Thomas* v. *Review Board*, 450 U.S. 707, 715-16 (1981) (immaterial that not all Jehovah's Witnesses would agree with religious basis for Thomas' conscientious claim); *Catholic Bishop*, *supra*; *Yoder*, *supra*; *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

The decisions of a religious school concerning the conformity of its teachers to "the standard of morals required of them", *Milivojevich*, 426 U.S. at 714, in matters of doctrine, discipline, and procedure are plainly at the core of its religious function and mission. This Court consistently has "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Catholic Bishop*, 440 U.S. at 501. *See, e.g., Meek*, 421 U.S. at 370; *Lemon*, 403 U.S. at 617; *cf., Wolman* v. *Walter*, 433 U.S. 229, 244 (1977). Given the purpose of religious schools like Dayton Christian Schools and the key role of the teacher in accomplish-

ing that purpose, it is no more accurate to classify the relationship between a teacher and a pervasively religious school system as an ordinary employment relationship than to similarly classify the relationship of a pastor to his or her congregation or denominational board. See 766 F.2d at 938 n.10. The role of the teacher is as central to the religious mission of a religious school as the role of a preacher is to the religious mission of a congregation.[6]

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[6] *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985), is illustrative of the facile nature of any "church"/"school" or "minister"/"teacher" dichotomy. *Rayburn* involved a claim of race and sex discrimination against the hiring decisions of a church for an internship leading to a position of "associate pastor" or "associate in pastoral care", the former an ordained position held only by men under Seventh-day Adventist polity, the latter a nonordained position held only by women. The duties in either case were identical and included teaching Bible classes, pastoring church members, occasional preaching, "and other evangelical, liturgical, and counseling responsibilities." *Id.* at 1165. The court of appeals held, on the authority of *Milicojevich*, that the internal personnel decisions of the church were constitutionally protected from governmental regulation. *Id.* at 1169.

The duties and responsibilities of personnel within a religious community are not a strict function of the title of the person. Moreover, the function of religious education is one performed by clergy and laity alike, and its importance as a religious mission is not necessarily determined by the formal status, *i.e.*, whether ordained or not, accorded the teacher by the religious group. *Rayburn* illustrates the extreme difficulty in drawing a principled line between "preachers" and "teachers".

The very inquiries that would need to be made into matters of church doctrine, administration, and polity in order to apply such a distinction are forbidden by the Constitution. Excessive entanglement in religious affairs is inevitable in any attempt by the state to decide which of several relationships within a religious institution would be subject to state supervision and which would not. Indeed, that is a large part of the issue in the instant case. The OCRC seeks to sift through Dayton Christian Schools' employment records and scrutinize its doctrine in order to test the validity of Dayton Christian Schools' claim that religious considerations are

In fact, the teacher's critical role is *precisely* "the predicate for [this Court's] conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools." *Catholic Bishop*, 440 U.S. at 501. See *Aguilar* v *.Felton*, No. 84-237 (July 1, 1985), slip op. 10; *id.* at 2 (Powell, J., concurring) ("too great a risk of government entanglement in the administration of the religious schools"); *Lemon*, 403 U.S. at 617. The governmental conduct in the instant case creates an excessive entanglement because of the combination of the same two elements cited in *Aguilar*, a "pervasively sectarian environment" and "ongoing inspection" by government. *Aguilar*, slip op. 10. See *infra* at pp. 18-20. The applicability of the First Amendment's prohibition on excessive governmental intrusion in religious affairs is not limited to churches, but extends to any pervasively sectarian environment, clearly encompassing the role of the teacher in a religious school.

The education of young children in religious schools is not beyond state regulation for all purposes. However, just as valid state interests in prescribing fire codes for church buildings do not justify regulating a church's choices of ministers or Sunday School teachers, the presence of valid state interests in child health, safety, and well-being which may arise in the education context, such as building safety and health standards, attendance laws, and minimum academic competency requirements, cannot be used as a bootstrap to justify state intrusion into central areas of a school's religious mission, such as religious hiring requirements, enforcement of religious discipline and doctrine, and maintenance of the desired religious and moral climate.

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paramount in its teacher personnel decisions. The "church"/"school" distinction would require an inquiry as intrusive, and a distinction as artificial and arbitrary, as the "completely religious"/"religiously associated" distinction asserted by the NLRB in the *Catholic Bishop* case. 440 U.S. at 499.

II. THE OHIO CIVIL RIGHTS COMMISSION DOES NOT HAVE A SUFFICIENTLY COMPELLING INTEREST TO JUSTIFY ITS INTRUSIVE SUPERVISION OF THE DECISIONS OF DAYTON CHRISTIAN SCHOOLS RESPECTING THE CONFORMITY OF ITS TEACHERS TO RELIGIOUS DOCTRINE, DISCIPLINE, AND ADMINISTRATION.

The prevention of sex discrimination in employment practices is an important one as it concerns society at large. See *Roberts* v. *Jaycees*, No. 83-724 (July 3, 1984). However, the issue presented here is whether the state may regulate private religious conduct among those who voluntarily affiliate themselves with a particular community of faith, particularly when the intrusion goes to the very core of the religious mission of a private religious school.

An individual may freely agree to be bound by religious dogma that forbids or requires certain conduct which, in the public sphere, she has a legal right to do or refrain from doing. Similarly, religious groups may require of their members, and certainly no less of the teachers in their religious schools, adherence to certain standards of conduct which differ from the norms and ethics of society. For example, pursuant to its beliefs, a religious group might decline to hire as a teacher one who is married to a person of a different faith, is divorced, wears or does not wear certain clothing, has an abortion, or participates in political affairs contrary to church directives.[5]

[5] If the OCRC may overrule Dayton Christian Schools' decision to fire a teacher for breaching a contractual agreement to abide by specific religious doctrine concerning dispute resolution, even where the initial dispute involved the schools' religious belief that mothers of preschool children should remain in the home, the OCRC may also regulate the school's decisions when the initial dispute involves violation of religious beliefs proscribing marriage outside the faith or abortion. Notwithstanding OCRC's protestations to the contrary, the schools' practice of these religious beliefs and numerous others would violate the Ohio statute.

The religious beliefs of Dayton Christian Schools regarding the role of a mother of very young children in a Christian family or the refusal to handle disputes within the structure of the church are indisputably sincerely held regardless of the extent to which they contradict certain general societal values.[6] The state may not substitute its vision of what is proper conduct for the religious beliefs of members of a religious group, merely because it is very strongly convinced that its norm is right and that of the religious group wrong. Rather, the state may proscribe religious practice only within narrowly prescribed boundaries, such as when it causes physical injury to those within the religious group or harms persons who have not submitted to the religious organization's authority. In the present case, the religious beliefs of Dayton Christian Schools involve only willing participants in a religious community.

A. The State Must Respect the Required Internal Dispute Resolution Procedures of a Religious Body.

This Court has emphatically rejected the assertion of authority by secular government over religious conduct involving decisions on matters of doctrine, discipline, church administration, polity, membership, personnel, internal governance, and conformity to religious principle or policy in matters of personal faith and conduct. See *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426

[6] By filing this brief, *amici* do not here attempt to defend the theological basis for Dayton Christian Schools' policy regarding the employment of women with preschool children or its internal dispute resolution procedures, which defense would, in any event, not be constitutionally relevant. Religious organizations must remain free to determine their own policies and practices in accordance with their own beliefs, without being called to account by secular courts to defend those religious beliefs. It is not necessary that such beliefs be "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection". *Thomas*, 450 U.S. at 714; see *id.* at 716 ("Courts are not arbiters of scriptural interpretation."). As the district court found, Dayton Christian Schools acted upon sincerely held religious beliefs. 578 F. Supp. at 1031-32.

U.S. 696 (1976) (impermissible to examine methods and motives of church decision regarding clergy personnel); *Presbyterian Church* v. *Hull Church*, 393 U.S. 440 (1969) (impermissible to examine alleged "departure-from-doctrine" of religious group in resolving church property disputes); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94 (1952) (state may not legislate with respect to church administration, operation or control); *Watson* v. *Jones*, 13 Wall. 679, 733-34 (1872) (civil courts may not inquire, *inter alia* into matters of religious discipline, ecclesiastical governance, or conformity of church members "to the standards of morals required of them").[7] It may be one thing where a dispute involving a religious organization involves matters wholly unrelated to religion or the carrying out of a religious activity, but as this Court has repeatedly stated:

> 'it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction—*a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morals required of them*, —becomes the subject of its action. . . . *[I]f the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil courts. This principle would deprive these bodies of the right of construing their own church laws*, would open the way to all the evils which we have depicted . . . , *and would, in effect, transfer to the civil courts . . . the decision of all ecclesiastical questions.*

Milivojevich, 426 U.S. at 713-14 (emphasis in original), *quoting*, *Watson*, 13 Wall. at 733-34.

Dayton Christian Schools' employment contract requires that "[a]ll differences . . . be resolved by utilizing Biblical principles—always presenting a united front". J.A. 61. Its teachers knowingly consent to be bound by religious authority and expressly contract into a system of Biblical dispute resolution. Although the state may not agree with Dayton Christian Schools' religiously-based procedures or the way in which they were applied in this case, the civil authorities are simply without jurisdiction to interfere in such matters or to challenge the motives of those applying religious procedures. See *Milivojevich*, 426 U.S. at 713 (speaking of "proper subject[s] of civil court inquiry" and recognition of judgments of church tribunals as binding on civil courts); *Watson*, 13 Wall. at 733-34 (religious matters are those "over which the civil courts exercise no jurisdiction").

B. The State May Not Substitute Its Values Regarding Gender Roles for Those Taught by a Religious Community within a Religious School.

The present case stems from a difference of opinion between a teacher and the religious leadership by whose authority she knowingly and voluntarily agreed to be governed. There is no question of the teacher's consent to be governed in all aspects of her employment relationship by religious authority and principle. She not only agreed to all aspects of Dayton Christian Schools' state-

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[7] *See also, Md. & Va. Churches* v. *Sharpsburg Church*, 396 U.S. 367 (1970); *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929); *cf., Catholic Bishop*, 440 U.S. at 502 (regulatory authority to inquire into matters of administration of religious school would implicate First Amendment rights).

Jones v. *Wolf*, 443 U.S. 595 (1979), is not to the contrary. *Jones* reaffirmed the principles of the above cases, *id.* at 602, but found that the general authority of civil courts to resolve *property* disputes could be accomplished by a "neutral principles" approach that avoided excesive entanglements with issues of religious doctrine or polity. *Id.* at 603.

ment of faith, including Paragraph 13, prescribing Biblical principles of dispute resolution, deference to authority within the religious community, and "presenting a united front", J.A. 60-61, but also in her essay responses to Dayton Christian Schools' employment questionnaire *affirmatively* manifested her personal religious commitment at the time of her hiring to adhere to the authorities placed over her. 578 F. Supp. at 1012.

As in *Milivojevich*, the teacher's dispute with religious authorities over her status and practices *within the religious community* lies exclusively within the jurisdiction of religious authorities. It is no part of the role of civil courts to review such judgments or scrutinize the theological rationale behind them. *Milivojevich*, 426 U.S. at 714-15 (immaterial whether ecclestiastical decisions are "rational or measurable by objective criteria"); *Rayburn*, 772 F.2d at 1169 (courts may not scrutinize religious decisions for their theological basis). In entering into employment with Dayton Christian Schools, the teacher freely submitted to a system of religious authority founded on the religious beliefs of the religious schools.

The state asserts an injury to women who potentially might seek employment as teachers with Dayton Christian Schools and who disagree with Dayton Christian Schools on matters of religious belief and policy regarding the role of women in the Christian family and the resolution of disputes according to Biblical principles. A religious institution is under no obligation to accept as members individuals who disagree with it on matters of faith it deems important. Certainly if a religious organization may deny membership to dissenting individuals, it may deny positions of leadership within the religious group to dissenters, particularly when the leadership position is that of educating the group's children. In the present case, there is no third-party injury because there is no third-party right to affiliate with a religious institution contrary to such institution's religious beliefs and policies.

The state offers a final justification for its intrusion: "Exposure to an educational atmosphere wherein any form of unlawful discrimination is practiced could have a substantial impact on the values these children eventually carry out into the world when they leave school." 578 F. Supp. at 1036. Whether the argument refers to harm to the children themselves or to society, it lacks merit.

The right of parents to direct the religious upbringing of their children includes the right to inculcate values that will be "carr[ied] out into the world when [the children] leave school", even when those values differ from those they might have received from secular schooling. Religious schools exist to inculcate parental religious values. The state may not regulate religious education for fear that religious schools will be effective in their mission.

The suggestion that the inculcation of the religious values at issue in the present case injures society, taken to its logical conclusion, would justify silencing the expression of any religious point of view that a majority of citizens deemed socially backward or otherwise misguided. Under the First Amendment, the state may not prohibit adherence to and propagation of a religious belief because it disagrees, even as to a matter of unquestioned significance. As Justice Jackson stated in *West Virginia* v. *Barnette*, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." 319 U.S. 624, 642 (1943).

III. EVEN IF THE OHIO CIVIL RIGHTS COMMISSION HAS A COMPELLING STATE INTEREST, IT HAS FAILED TO EMPLOY THE LEAST RESTRICTIVE MEANS BUT INSTEAD HAS CREATED EXCESSIVE ENTANGLEMENT BY ITS MONITORING, SUPERVISING, AND REGULATING A RELIGIOUS INSTITUTION.

Even if the state has a compelling interest in regulating the affairs of Dayton Christian Schools, the means employed to achieve its ends extend far beyond legitimate bounds and create an intrusive entanglement of state with church in the monitoring, surveillance, and regulation of core religious activities. In the present case, the governmental interest will not be undermined by allowing an exception in those limited number of cases where application of the Ohio statute would otherwise run afoul of fundamental First Amendment values. Within reason, the OCRC would be able to respond to a sex discrimination complaint against a religious school for the purpose of ascertaining that the school actually holds sincere religious beliefs which affect its employment decisions. *See, e.g., Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963).

As this Court declared in *Catholic Bishop*, "[i]t is not only the conclusions that may be reached by the [governmental body] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502. The proceedings which have already occurred illustrate the breadth and depth of OCRC's present intrusion into, and entanglement with, the religious decisions and autonomy of Dayton Christian Schools.[8] The scope of investigation and discovery sought and the consent order proposed are highly intrusive. 766 F.2d at 943, 950-52,

[8] In a sense, this Court can only stop an injury to Dayton Christian Schools' constitutional rights that has already been realized. The School has had to pursue its rights through five years of expensive litigation.

958-61. The proposed conciliation agreement and consent order are "coercive tools to compel [Dayton Christian Schools] to relinquish the mandates of their consciences." *Id.* at 951. The order would stipulate "that the Commission has full and complete jurisdiction of the parties and subject matter", would require the teacher to be reinstated with back pay, would require the school to display prominently OCRC's requirements, including the obligation not to discriminate on the basis of religion,[9] would authorize the OCRC to make whatever "compliance reviews . . . the Commission believes to be warranted" for a period of three years, and would commit Dayton Christian Schools to provide to the OCRC "whatever information is required by the Commission in order to implement such reviews", under threat of further prosecution. *Id.*

It is difficult to imagine a more full-blown example of the "comprehensive, discriminating, and continuing state surveillance" against which this Court warned in *Lemon*, 403 U.S. at 619. See *Catholic Bishop*, 440 U.S. at 501-504. In the present case, such intrusive state action:

> will inevitably be required to ensure that these restrictions are obeyed . . . . [These] contacts will involve excessive and enduring entanglement between state and church. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools *and hence of churches. . . . [W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.*

[9] This would appear independently unconstitutional under *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette, supra. Cf., Stone* v. *Graham*, 449 U.S. 39 (1980).

Lemon, 403 U.S. at 619-20 (emphasis added). The degree and scope of the state intrusion here is especially burdensome, given its relationship to the values of religious autonomy long affirmed by this Court in cases such as *Watson*, *supra*, *Kedroff*, *supra*, *Hull Church*, *supra*, *Yoder*, *supra*, *Milivojevich*, *supra*, and *Catholic Bishop*, *supra*.

In addition, the "chilling effect" on the exercise of First Amendment rights by religious institutions resulting from the threat of government intrusion in its personnel decisions is severe and immediate. See *Catholic Bishop of Chicago* v. *NLRB*, 559 F.2d 1112, 1124 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979), *citing*, *Speiser* v. *Randall*, 357 U.S. 513 (1958). This chilling effect is accentuated by the overbroad nature of the state statute. The Ohio statute prohibits employment discrimination because of *religion*. The obvious overbreadth of this sweeping and imprecise statute, outlawing all personnel decisions by religious groups that are made for reasons of *religion*, is in itself reason to invalidate the state's proposed exercise of authority in the present case.

As the court of appeals noted, the parents here "have few options." 766 F.2d at 961. They may abandon their religious beliefs and rights to direct the education of their children in accordance with their religious principles by placing their children in public schools. They may abandon these beliefs and rights by allowing the state to dictate the personnel practices of the religious school. They may seek to educate their children at home, or they must seek a more tolerant jurisdiction. See *Yoder*, 406 U.S. at 218 (Amish community "must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."); *id.* at 218 n.9 ("forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses").

The First Amendment protects these parents and this private religious school. The state may not compel a private religious school and the parents of students attending that school to violate their sincerely held religious beliefs by requiring the school to continue to employ a teacher who acts contrary to those religious beliefs. Furthermore, if the state intrudes into the employment decisions of a religious school, it will become impermissibly entangled in matters pertaining to religious doctrine, discipline, and administration of a religious institution.

CONCLUSION

Accordingly, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

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February 5, 1986

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, *et. al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et. al.*,
Appellees.

On Appeal From The United States Court Of Appeals For The Sixth Circuit

BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AMICUS CURIAE, IN SUPPORT OF APPELLEES.

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QUESTION TO WHICH THIS BRIEF IS ADDRESSED

Whether the exercise of jurisdiction by the Ohio Civil Rights Commission over employment of church-school teachers by a religious organization constitutes an impermissible governmental intrusion in violation of the Religion Clauses of the First Amendment?

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On Appeal From The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AMICUS CURIAE, IN SUPPORT OF APPELLEES

I. INTEREST OF THE AMICUS CURIAE[1]

The Seventh-day Adventist Church is a world-wide religious denomination. Organized in 1863, today it has a membership of about 4.5 million people. There are more

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[1] Written consent of the parties to the filing of this Brief has been obtained as required by Rule 36.2 of the Supreme Court Rules.

than 4,280 local Seventh-day Adventist congregations in North America with a membership of some 684,340.

World-wide the Seventh-day Adventist Church maintains over 4,200 elementary schools, 892 secondary level schools, 91 colleges and universities and 35 schools of nursing. In the United States the Adventist Church operates the second largest Protestant parochial school system with 1,139 elementary schools, 90 secondary level institutions, and 11 colleges and universities.

The Church in North America employs some 1,333 elementary teachers and approximately 1,663 high school and college level teachers and instructors. These elementary schools have an enrollment in excess of 52,180. There are approximately 19,000 students attending the Church's secondary schools in this same region.

The Seventh-day Adventist Church views its educational system as an integral part of the Church's religious mission. A large portion of the budget of the Church is committed to the maintenance and operation of this world-wide system. The Adventist Church conducts these schools for the purpose of transmitting its religious ideals, beliefs, attitudes, values, habits and customs to the children of its members. It strongly believes that there is peculiar to the Church a body of knowledge and values that must be transmitted to the younger generation within the Church in order that the Church may survive.

Unlike secular commerce where capital and labor are combined to produce pecuniary benefit, the Seventh-day Adventist church school exists solely to teach the fourth "R" of "religion" and to maximize the likelihood of the student finding a faith in God. Adventist church schools exist through the generous voluntary contributions of

church members who are committed to the belief that the future of the Church must be built on the foundation of its youth. Parents who pay taxes to the government in support of the public school system also pay tuition to the church school for the religious education of their children.

As a religious mission, the Adventist church school is "too" religious to qualify for direct tax support because of interpretations given the Establishment Clause of the First Amendment. Conversely, it would be inconsistent to argue that the participation of the church school in the free exercise of religion process involving the voluntary, sacrificial contribution and support by church, teacher, parent, and child would nevertheless subject the church school to the jurisdiction of secular laws designed for commercial enterprise. It is inconsistent and unfair to argue that the church school is too religious for government financial support but not religious enough to be immune from the application of laws which threaten to the survival of its spiritual mission.

The Seventh-day Adventist Church believes that its teachers are servants of God and the students, children of God. Church school teachers, like Adventist clergymen, are commissioned and credentialed by the Church because of their professional qualifications as teachers; and because of their commitment to unselfish, sacrificial service exemplified in the life of Christ and his followers. The Church believes that Christ Himself was a "teacher" and performed his ministry unselfishly without financial reward or benefit. The twelve disciples responded to Christ's "call" and served without reference to reimbursement or reward. The apostle Paul was a "missionary" in the Roman world who contributed his services to the Christian church and earned his living as a tentmaker.

Teachers in the church schools of the Seventh-day Adventist Church are paid a sacrificial living wage made possible by the sacrificial contributions of church members and the parents of students. The wage is not competitive with that of the public school system. Commitment to this unselfish contribution of time and talent is an anchor component of the religious mission of the Adventist church school and the religious teaching of the sponsoring church. Any intrusion on this delicate religious equation would subvert the basic doctrinal core of a religious philosophy that permeates every class and the educational environment which is the essence of the Adventist church school.

The Seventh-day Adventist Church has long championed the defense of religious freedom. It has pursued such a course not only for its own members but also on behalf of other religious persuasions who have sought the protection of their constitutional rights secured by the Religion Clauses of the First Amendment

The important constitutional question raised here; the likely impact of any holding by this Court on the operations of its church schools; the concern of the Church for the full protection of its right to operate schools free from excessive government entanglement; and the importance of preserving the freedoms secured by the Religious Clauses have all prompted the filing of this brief.

II. ARGUMENT

This Court has consistently and repeatedly recognized the critical and unique role of the parochial school teacher in fulfilling the mission of a church-operated school. As in *Lemon* v. *Kurtzman*, 403 U.S. 602, 617 (1971), and as is certainly the case in Seventh-day Adventist schools:

"Religious authority necessarily pervades the school system."

The central role played by church school teachers in a religious educational system has been the basis for the Supreme Court to conclude that government aid channeled through such persons would create an impermissible risk of governmental entanglement in the affairs of church-owned, operated and affiliated schools. In *Lemon*, 403 U.S. at 617, the Court observed:

> In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation.

Again, in *Meek* v. *Pittenger*, 421 U.S. 349, 370 (1975), this Court acknowledged the important role which the teacher played in a church school: "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." Cf. *Wolman* v. *Walter*, 433 U.S. 229 (1977).

To subject church school teachers to scrutiny by the Ohio Civil Rights Commission would give rise to "excessive government entanglement" with religious institutions prohibited by the Establishment Clause of the First Amendment, *Lemon*, 403 U.S. at 613. Under *Lemon*, entanglement is measured by the "character and purposes of the institutions that are benefited, the nature of the aid . . . and the resulting relationship between the government and the religious authority." 403 U.S. at 615.

Any evaluation under this criteria requires church schools to be exempt from the type of governmental scrutiny which would result under the Ohio Civil Rights Act.

The Commission here seeks to bring within its purview matters pertaining to the employment, discipline, and discharge of church school teachers. This position creates a significant likelihood of entanglement. As the dangers of entanglement remain severe with respect to aid to parochial schools, *Aguilar* v. *Felton*, 105 S.Ct. 3232 (1985), they are all the more serious when involving matters respecting the employment of those persons who are to carry out the spiritual mission of such institutions. While church schools serve both secular and sectarian functions, the purpose of such schools is essentially spiritual, and the very real danger of "interaction between church and state," *Lynch* v. *Donnelly*, 104 S.Ct. 1355, 1364 (1984), is precisely what the Establishment Clause protects against.

Giving the Commission the power to regulate employment decisions of this nature would result in an intolerably close relationship between church and state on both a substantive and procedural level. On the substantive level, the importance of "spirituality" is an attribute of a person hired to work in church schools where reliance upon the guidance of the Holy Spirit in the selection process confirms—at least in Seventh-day Adventist schools—the religious nature of the position. It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit. Neither can a Commission hearing nor a courtroom provide an appropriate forum to review a church's determination of God's appointed.

Moreover, the goals of the Adventist Church in the selection of church school teachers and of a governmental

agency in the performance of its statutory mandate may not be the same. The Commission may or may not share the same values of a church whose highest priority is of fidelity to its own beliefs and practices. The selection of a church school teacher by a church may at times result from preferences wholly impermissible in the secular sphere. Where these goals differ, the danger from state intrusion becomes apparent. But "[e]ven if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal." Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373, 1399 (1981). Where the values of state and church clash or where there is a differing emphasis among priorities or as to means in an employment decision, the church should be entitled to pursue its own path without concession to the views of a state agency or commission. Bureaucratic participation in employment decisions pertaining to a church school teacher, in contravention of a church's own perception of its needs and purposes, would constitute unprecedented entanglement with religious authority and compromise the premise "that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Board of Education*, 333 U.S. 203, 212 (1948).

On a procedural level, entanglement would also result from a protracted legal process pitting church and state as adversaries in disregard of *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). "[P]ervasive monitoring by public authorities . . . infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." *Aguilar* v. *Felton*, 105 S.Ct. at 3238.

Proceedings by the Commission against religious organizations are likely to be lengthy, involving initially state agencies and commissions and eventually trial and appellate courts. Church personnel and records would inevitably become subject to subpoena, discovery, and cross-examination. The state would have recourse to the full panoply of legal process designed to probe the mind of the church in the selection of a church school teacher. The remedies that might ultimately be imposed could have far-reaching impact upon a religious organization. Even after entry of judgment, future questions of compliance would likely result in continued surveillance of the church's policies and decisions.

In *Catholic Bishop of Chicago*, the Supreme Court, determined that church-operated schools were not subject to jurisdiction of the National Labor Relations Board. "It is not only the conclusions that may be reached by the Board which may inpinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." 440 U.S. at 502. Here, there exists a similar danger that churches, wary of Commission or judicial review of their decisions, might act with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of its own personal and doctrinal assessment of which person would best serve the educational needs of its children.

Obviously, the Ohio Civil Rights Commission is subject to the constitutional limitations of the First Amendment's Religion Clauses. The exercise by the Commission of jurisdiciton over the employment practices of religious organizations in the selection of church school teachers would clearly entangle that governmental agency with the religious mission of such organizations.

As the Court said in *Lemon*, 403 U.S. at 616:

> [P]arochial schools involve substantial religious activity and purpose. The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.

Justice Douglas emphasized this point in his concurring opinion: "the admitted and obvious fact that the *raison d'être* of parochial schools is the propagation of a religious faith." 403 U.S. at 628.

Church schools have been described as "sectarian," "substantially religious," and "religion-pervasive" institutions. E.g., *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 748-54 (1976); *Meek* v. *Pittenger*, 421 U.S. at 366 (1975); *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 481 (1973); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 767-68 (1973). As such they have been determined too religious to receive governmental assistance. In fairness, they should also be exempt from regulation by the Ohio Civil Rights Commission. An evenhanded approach to justice suggests that the Religion Clauses, serving as a buckler to prevent financial aid to church schools, should be equally effective to ward off the inhibiting effect of the governmental regulation here involved.

III. CONCLUSION

For the reasons stated here, and because of the Adventist Church's concern with the integrity of its own educational system—uniquely designed to carry out a spiritual mission—we believe that the decision of the Sixth Circuit should be affirmed.

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AMICUS CURIAE

BRIEF

No. 85-488

Supreme Court, U.S.
FILED
FEB 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

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Appellants,

vs.

DAYTON CHRISTIAN SCHOOLS, INC. *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AMICUS CURIAE

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AMICUS CURIAE

Interest of the Amicus Curiae

The National Jewish Commission on Law and Public Affairs ("COLPA") is the volunteer non-profit membership organization of lawyers and social scientists that represents the Orthodox Jewish community in public forums on legal issues that affect the community. We speak in this case (as we have frequently done before) on behalf of a broad spectrum of the American Orthodox Jewish community, including the following national Orthodox Jewish rabbinic, synagogal, educational and social service organizations which represent the broad spectrum of the Orthodox Jewish community in this country:

Agudath Horabonim of the United States and Canada
Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Torah Umesorah, The National Society for Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

This case is of substantial importance to the Orthodox Jewish community because it concerns the extent to which government may interfere with the freedom of religious organizations to run their educational institutions in the manner best calculated, in their view, to uphold the practices and beliefs of the religion and transmit them to the children of their adherents. It is not a tenet of Orthodox Judaism that women with young children cannot teach in religious schools because they must stay home with their children. But Orthodox Judaism does prescribe different religious obligations for women than for men and often requires separation by gender during education and other activities. It is an important tenet of Orthodox Judaism that men and women be separated during prayer services. Many Orthodox Jewish schools subscribe to the belief that, for religious reasons, boys and girls must attend separate classes (or even separate schools). Orthodox Jewish schools often provide male teachers for classes of boys and young men, and they assign female teachers to classes of women. Jewish law also prohibits or discourages recourse to secular court systems to resolve disputes between Jews that could be decided in accordance with Jewish law before rabbinical courts.

In addition, Jewish schools frequently prescribe codes of modesty, dress, religious observance and other conduct

to which teachers employed by the schools, as well as other personnel who provide role models for students, must adhere. Adherence to these standards by teachers at religious schools is jeopardized by a decision permitting State anti-discrimination laws to apply to the educational activities of religious schools. We believe that the Free Exercise Clause of the First Amendment requires that the educational functions of religious schools not be subject to federal, state or local anti-discrimination laws. As a consequence, the employment, discharge or assignment of all instructional personnel at sectarian schools is constitutionally exempt from government regulation or supervision.

This brief is filed with the written consent of the parties.

ARGUMENT

Introduction

It is important to emphasize, at the outset, what this case does and does not involve. A private elementary school operated by a religious denomination has been charged with violating a State's anti-discrimination law in terminating the employment of a classroom teacher. The case concerns the extent to which governmental regulation may intrude into the most sensitive of a religious school's functions—the selection and retention of the teachers who convey the institution's message to its students. The case does not involve the authority of a governmental agency to regulate commercial operations owned by a religious institution. Nor does it affect the non-religious functions of a religious school or the health-and-safety conditions under which employees of the school work.

Our position is simply stated: The Establishment and Free Exercise Clauses of the First Amendment shield religious institutions from governmental oversight, regulation and entanglement of any kind into the selection and assignment of employees who teach and propagate the institutions' religious messages. Regardless of whether an employee serves as a minister, cantor, sexton, teacher, or classroom aide, the State has no right to interfere, in any manner, with whom the religious institution hires for religious guidance or instruction.

Our basic premise is that the selection by a religious body of those who administer or teach its rites and religious duties must be the exclusive province of the religious body. If a governmental agency even initiates inquiry into that selection in any manner, it invades an area that is beyond the reach of government authority under the First Amendment.

We recognize, of course, that a religious school is not entirely free from all governmental regulation in matters that affect the health or safety of its students or its teachers. Nor is a religious institution exempt, *ipso facto*, from generally applicable economic measures such as minimum-wage laws or rules relating to tax withholding. But no governmental proceeding may be initiated into the selection, termination, or assignment of personnel who participate in any manner in the religious mission of a religious institution without violating the constitutional policies underlying the Free Exercise and Establishment Clauses of the First Amendment.

I

A RELIGIOUS SCHOOL HAS A CONSTITUTIONAL RIGHT TO SELECT PERSONS TO PREACH OR TEACH ITS RELIGIOUS MESSAGE WITHOUT ANY INTERFERENCE FROM THE STATE.

In a long and well-established line of cases, this Court has repeatedly emphasized that secular courts have no right to intervene in the religious affairs of a church or other religious organization. *See, e.g., Watson v. Jones,* 80 U.S. (13 Wall.) 679, 727-29 (1872); *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 708-15 (1976). Part of this fundamental principle—which is at the very heart of the First Amendment—is that religious organizations must have the absolute right to select the individuals who will minister to the faithful, preach the organization's religious beliefs, and otherwise perform those functions required under the particular beliefs and traditions of the religion. This right, which is inextricably intertwined with the right to practice one's religion, must be absolute. As this Court observed in *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952), "freedom to select the clergy . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." The district court, recognizing this important principle, concluded that "[w]ere decisions with respect to the teachers at DCS properly viewed as ecclesiastical matters, clearly the OCRC could not intervene or attempt to bring the proscriptions of Chapter 4112 to bear upon the institution." 578 F. Supp. at 1029.

The constitutional policy that affords a church total freedom to select its clergy applies equally to anyone who engages in any instructional capacity in a religious school. This Court has frequently recognized the distinctive role

of instructional personnel at sectarian schools—extending even to teachers who do not teach subjects formally in the religious curriculum. And the Court has observed that governmental interference of any kind into the employment relationship between a religious school and its teachers raises serious questions under the First Amendment.

In *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court, speaking through the Chief Justice, specified the constitutional concerns in terms that apply forcefully to this case. The Court discussed the principles derived from the aid-to-parochial-school cases, which had theretofore established "the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Id.* at 501. The Court expressed the view that even well-intentioned legislation designed to further collective bargaining cannot, if applied to teachers at church schools, "avoid entanglement with the religious mission of the school." *Id.* at 502.

The Court in *Catholic Bishop* noted that the potential constitutional flaw in subjecting sectarian-school teachers to the regulatory reach of the National Labor Relations Board was not limited to the outcome of Board proceedings. Rather, the Court stressed, even the agency's investigation into allegations of discrimination might itself jeopardize First Amendment liberties:

> The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Id. (footnote omitted).

The great sensitivity exhibited by this Court in the *Catholic Bishop* decision regarding any governmental intrusion whatever into the employment relationship between a religious school and its teachers emerges from established principles under the First Amendment. In its 1952 *Kedroff* opinion, the Court confirmed that under our constitutional scheme there has long been

> a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

344 U.S. at 116. Because of the importance of such autonomy, the relationship between a religious denomination and its ministers is constitutionally immune from governmental regulation. *See McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). The same considerations should apply, under the approach taken by this Court in the *Catholic Bishop* case, to all instructional personnel at a religious school.

The fact that teachers of *all* subjects at sectarian schools are viewed as participants in the school's religious indoctrination has become, under this Court's recent decisions, an irrebuttable constitutional presumption. In *Grand Rapids School District v. Ball*, 105 S. Ct. 3216 (1985), the Court held that even teachers of secular subjects, selected by and responsible to public officials, are presumed, as a matter of constitutional law, to be engaged in religious indoctrination when teaching within the physical facilities of a religious school. The Court said:

> Teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction pro-

> vided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect. . . . When conducting a supposedly secular class in the pervasively sectarian environment of a religious school, a teacher may knowingly or unwillingly tailor the content of the course to fit the school's announced goals.

Id. at 3225-26. On the basis of this assumption, this Court has barred public financial assistance to the secular programs of religious institutions. It would be extraordinarily unjust to forbid public assistance for all instructional personnel at a religious school—including teachers of secular subjects—because they are deemed to be participants in the school's religious indoctrination while, at the same time, allowing governmental oversight of the hiring and firing of such instructional personnel on the ground that they are non-religious and substantively different from clergy. If *all* teachers in religious-school buildings are presumed, for purposes of the Establishment Clause, to be "an integral part of the dominant sectarian mission" (*Meek v. Pittenger,* 421 U.S. 349, 371 (1975), quoted in *Grand Rapids School District v. Ball,* 105 S. Ct. at 3223), they should be similarly classified for purposes of the Free Exercise Clause. Government may not intrude into a church's or synagogue's choice of a minister or a rabbi who carry out "the dominant sectarian mission," and government should similarly be barred from interfering with the selection of all instructional personnel who work towards the same religious objective.

Both courts below conducted a careful examination of the character of the appellee. They concluded that the school involved in this case is "a pervasively religious institution," 766 F.2d at 938, providing a "pervasively religious environment." 578 F. Supp. at 1018. They found that "religious concerns permeate all aspects of the educational process," 766 F.2d at 938, so that "the school

demands that teachers conform both in thought and conduct to the tenets and principles felt essential to leading a Christian life.". 578 F. Supp. at 1019. These findings were based on evidence that "[t]he entire process of education [at DCS] is seen as a means used by the Holy Spirit to bring the student into fellowship with God," and that all subjects were taught "in a manner to create in each student an awareness of God's Supreme authority over all creation." 578 F. Supp. at 1009. As Paul Pyle, a teacher at DCS, put it: "[I]n my endeavors in the classroom, the entire class period is given over to religious activities." 766 F.2d at 938. These factors, once established, surely increase the likelihood that any governmental investigation into the reason for discharging a particular teacher would expose the religious observances of the school's administrators, students, and supporters to constitutionally impermissible official scrutiny and appraisal. But the liberty guaranteed by the Free Exercise Clause is not limited to cases where such showings are preliminarily made. The constitutional right is violated if an institution must first make so overwhelming a demonstration of "pervasive" religious influence before it may repel a government agency's jurisdiction. The extensive inquiry conducted by the district court into the religious character of all activities of the appellee is itself a significant burden that is inconsistent with the separation and "non-entanglement" principles of the First Amendment's Religior Clauses. That is precisely what this Court warned against when it said, in *Catholic Bishop,* that "the very process of inquiry leading to findings and conclusions" would "impinge on rights guaranteed by the Religion Clauses." 440 U.S. at 502.

A clear constitutional line that effectively carries out the policies of the Religion Clauses is that private religious schools cannot be restricted in any manner by anti-

discrimination laws in the selection or assignment of instructional personnel. Acceptance of such a constitutional rule would avoid the expensive and time-consuming task of examining the principles by which each religious institution is operated and the potential burdens on religious belief growing out of each jurisdiction's idiosyncratic anti-discrimination procedures. It would also preclude the offensive inquiry into the sensitive areas of religious conviction that this Court disapproved in its *Catholic Bishop* decision. *See* 440 U.S. at 502 n.10, 507-08 (Appendix).*

*Different considerations may apply where the school involved is a college or other institution of higher learning, rather than an elementary or secondary school. This Court has recognized that institutions of higher learning, as opposed to elementary and secondary schools, are not necessarily pervasively sectarian in nature. See *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971). Therefore, it may be constitutionally permissible for the State to apply generally-applicable anti-discrimination laws to the selection of teaching personnel of secular subjects in religiously-affiliated colleges which are not pervasively sectarian, provided that the particular application of these laws would not infringe upon the religious beliefs of the institution.

II

OHIO'S INTERFERENCE WITH APPELLEE'S AUTONOMY IN SELECTING ITS TEACHERS IS NOT JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

It is well established that the First Amendment's guarantee of freedom of religion applies not only to belief but also to conduct. *E.g., Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). While the right to practice one's religion—unlike the freedom of belief—is not absolute, it may be infringed only if it conflicts with a compelling governmental interest. As this Court explained in *Sherbert v. Verner*, 374 U.S. 398 (1963), a showing "merely of a rational relationship to some colorable state interest" does not permit a State to infringe upon the free exercise of religion. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." 374 U.S. at 406, quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Thus, only if the actions of a religious organization are fundamentally contrary to public policy to the extent that a compelling governmental interest requires that a particular practice of the organization be outlawed may the State step in to ensure that the public health, safety and welfare is preserved. *See, e.g., Reynolds v. United States*, 98 U.S. 145, 164 (1878) (upholding federal law outlawing polygamy and rejecting free exercise claim on basis that polygamy is an "odious" practice which has, "from the earliest history of England . . . been treated as an offense against society"); *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 113-14 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (barring pastor of church from "handling, displaying or exhibiting" dangerous and poisonous snakes "in a crowded church sanctuary, with virtually no safeguards, [and] with children roaming unattended").

If one could conceive of a "compelling governmental interest" that would justify overriding a church's decision of what ministers or teachers to hire, such an interest would prevail, under accepted constitutional guidelines, over the free exercise rights of adherents to the church. The governmental interests cited by the appellants do not, however, qualify under this standard.

The decision of the Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), provides an illustrative example of how compelling a governmental interest must be to overcome one's First Amendment right to freely practice one's religion. There, the Court ruled that, despite the State's significant interest in requiring that every child be provided with a full and complete education, the right of the Amish to practice their religious beliefs—which prohibit giving their children more than an eighth grade education—was even more compelling. As the Court explained:

> Where fundamental claims of religious freedom are at stake . . . we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

406 U.S. at 221. The Court recognized that the State has "a high responsibility for education of its citizens" and that "[p]roviding public schools ranks at the very apex of the function of a state." *Id.* at 213. Nevertheless, the Court also found that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in society." *Id.* at 213-14. The Court pointed to its earlier decision in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), where it held that parents have a right to send their children to private religious schools rather than to state-operated

public schools. *Pierce*, the Court reasoned, "stands as a charter of the rights of parents to direct the religious upbringing of their children." 406 U.S. at 233. Thus, the Court determined that the state's "all-encompassing" claim to prescribe compulsory education for all children could not constitutionally be applied so as to bar the Amish from fulfilling their religious obligation to limit their children's education to eight grades. *Id.* at 234.

The interest of the State of Ohio in eliminating discrimination based on sex is no greater than the State's interest in *Yoder* in ensuring that every child receives an adequate education. Just as the State's interest in *Yoder* was not frustrated by making an exception for the Amish, so here the objectives of the State would not be frustrated by allowing parochial schools to select their teaching personnel without regard to an otherwise-applicable state policy. The interest of the State in ensuring equal opportunity to all workers in the marketplace cannot be seriously threatened by allowing religious schools and other religious organizations to make their own determinations of whom to employ in order to carry on their religious mission.

Bob Jones University v. United States, 461 U.S. 574 (1983), is not to the contrary. *Bob Jones* was a case involving a compelling national policy that constitutionally overrode religious convictions. The dominant national policy of "eradicating racial discrimination in education" was at stake. 461 U.S. at 604. As the Court explained: "Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education." *Id.* at 593. This Court discussed the years of struggle in the United States to eradicate racial discrimination and concluded:

> Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine of *Plessy v. Ferguson, supra,* it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life," or should be encouraged by having all taxpayers share in their support by way of special tax status.

Id. at 595.

The case at hand does not, of course, involve racial discrimination. Nor does it present the potential for possible widespread evasion of an important public policy, as did the *Bob Jones* case. It concerns the relatively inconsequential effect of granting to religious schools absolute discretion to hire, fire and assign teachers. If such a school determines, as the appellee here did, to discharge a teacher because she is the mother of infant children or because she brought her grievance against the school to the attention of secular authorities, there is little impact on any important government policy. Such a decision does not result in foreclosing mothers of infant children or, indeed, women in general, from a significant part of the job market. Nor is a State's policy against employer retaliation for employees who report alleged violations of law furthered substantially by extending that protection to the small number of potential claimants who are employed by religious groups that discourage resolution of such conflicts outside the church. Thus, unlike *Bob Jones*, where the compelling state interest in eliminating racial discrimination in education could have been threatened by allowing a tax exemption for religious schools which practice racial discrimination, the exception proposed in this case would not undermine any important state

policy—even if the interests involved were demonstrated to be "compelling."

Moreover, the Court in *Bob Jones* only held that the government's "fundamental, overriding interest in eradicating racial discrimination in education" required that Bob Jones be denied a *tax exemption* under Section 501(c)(3) of the Internal Revenue Code. 461 U.S. at 604. The Court did not require that Bob Jones change its racially discriminatory practices which were based on "sincerely held religious beliefs," *id.* at 602; rather, it only upheld the denial of a tax exemption to Bob Jones. As the Court emphasized: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets." *Id.* at 603-04. By contrast, the intrusion into the operations of DCS contemplated by the Ohio Civil Rights Commission would directly intrude into the everyday operation of the school and make it impossible for it effectively to carry out its religious mission. Such a drastic infringement on the freedom of religion cannot be supported by this Court's holding in *Bob Jones.*•

The State interest involved in the case—the elimination of discrimination based on sex—cannot be compared to the interest involved in *Bob Jones.* Although this Court has often struck down statutes which invidiously discriminate on the basis of sex, *see, e.g., Reed v. Reed,* 404 U.S. 71 (1971), it has not hesitated to uphold statutes which have the effect of discriminating on the basis of sex, provided that there is a substantial basis for the classifica-

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•In *Runyon v. McCrary,* 427 U.S. 160 (1976), where the Court held that it was unlawful for private schools to discriminate on the basis of race, the Court took pains to stress that the schools involved did not practice racial discrimination "on religious grounds," and thus no claim under the free exercise clause was presented. *Id.* at 167 & n.6.

tion. *See, e.g., Geduldig v. Aiello,* 417 U.S. 484 (1974) (upholding statute which excluded pregnancy-related disabilities from disability insurance benefits); *Rostker v. Goldberg,* 453 U.S. 57 (1981) (upholding exclusion of women from military draft since they could not be called upon for combat duty). Thus, the interest in preventing discrimination on the basis of sex has not been held to rise to the same level as the interest in eradicating racial discrimination at issue in *Bob Jones.*•

Nor is petitioner's position supported by *Roberts v. United States Jaycees,* 104 S. Ct. 3244 (1984). The Court in *Roberts* relied on its determination that the Jaycees, whose local chapters are "large and basically unselective groups," employ no criteria, except for age and sex, "for judging applicants for membership." *Id.* at 3251. This consideration, the Court found, "place[d] the organization outside of the category of relationships" entitled to heightened "constitutional protection." *Id.* Moreover, the Court concluded that "the Jaycees have failed to demonstrate that the Act imposes any serious burden on the male members' freedom of expressive association," since the Human Rights Act in question "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id.* at 3254. By contrast, the Court in *Roberts* recognized that certain "highly personal relationships" are entitled to "a substantial measure of sanctuary from unjustified interference by the State."

•As William T. Coleman, Jr. put it in his argument before the Court in *Bob Jones*: "We didn't fight a civil war over sex discrimination and pass an amendment to the Constitution against it. No one can say it's as fundamental in our history. You just can't compare [racial discrimination] with any other activity. [The policy against racial discrimination] is the one policy that is crystal clear." Quoted in 51 U.S.L.W. 3296 (1982).

Id. at 3250. In listing the rights "entitled to this sort of constitutional protection," the Court included "the raising and education of children." *Id.* It is submitted that this is the very interest implicated in the case at hand. The fact that religious considerations are also presented here only strengthens the "measure of sanctuary" which must constitutionally be provided "from unjustified interference by the State."

It is also significant that the Minnesota law at issue in *Roberts* applied only to *public accommodations.* The Jaycees were considered to be a "place of public accommodation" because of their use of public facilities and the absence of "specific and selective" criteria for membership. *Id.* at 3256. Because of the public interest in eradicating the type of *public* discrimination practiced in *Roberts,* the State may well have had a compelling interest in barring sex discrimination by the Jaycees. DCS, by contrast, is undisputedly a private religious organization which does have specific and defined criteria for membership, and any governmental interest in eliminating *public* discrimination is simply inapplicable here.

The State's argument that *no* accommodation can be made in the case at hand because it will "significantly impair the State's goal of eradicating employment discrimination" (Appellants' Brief at 31) proves too much. The State concedes that it "certainly is not contending churches are not free to hire only male ministers" (Appellants' Brief at 17). Thus, the State has conceded that it cannot and should not eliminate all discrimination based on sex in the hiring of personnel by religious institutions. We therefore are not confronted with the type of "mandatory" and "comprehensive" program which, the Court has determined, admits no First Amendment exception, since it "must be uniformly applicable to all."

United States v. Lee, 455 U.S. 252, 258, 261 (1982). Even according to the State, some discrimination based on sex must be allowed to preserve the rights of religious freedom guaranteed by the First Amendment, and the only question is the *extent* to which an exception may be made for religious organizations. The *amicus* respectfully submits that allowing an exception in the present case not only is required by the free exercise clause but also will not significantly impair Ohio's general interest in barring discrimination on the basis of sex.

To be sure, there have been isolated decisions in lower courts involving the application of federal anti-discrimination provisions to teachers at religious schools. To the extent that such decisions imply that governmental investigations of allegations of discrimination in pervasively religious schools are constitutionally permissible, they conflict with this Court's strong warnings in the *Catholic Bishop* opinion. One such case, *Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), rejected First Amendment objections to the EEOC's investigation of a charge against a "pervasively sectarian" college alleging racial and gender discrimination on the erroneous ground that "faculty members are not intermediaries between a church and its congregation." 626 F.2d at 485. The Fifth Circuit erroneously held that teachers "neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine." *Id.* In addition, the Fifth Circuit failed in the *Mississippi College* decision to consider the inhibiting effect of the EEOC investigation. It held that if the federal civil rights laws applied, the impact on the free exercise of religion would be "limited in scope and degree." *Id.* at 488. This Court found otherwise in its *Catholic Bishop* opinion. *See* 440 U.S. at 501-04.

Cases in which prohibited discrimination based on race or gender is alleged by employees of religious organizations who are not involved in any instructional capacity are, of course, different from this case. Hence a discrimination action brought by an "editorial secretary" of a church-operated publishing house (*Equal Employment Opportunity Commission v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982)) or by a "typist-receptionist" employed by a church group (*Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975)), presents wholly different constitutional issues. In those situations, the governmental interest in eradicating racial, gender or age discrimination may possibly override the religious organization's interest in freely selecting among secretarial or typist applicants—at least where no religious tenet supports the type of discrimination involved. But the interest of a religious school in freely selecting its teaching personnel is plainly more substantial.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-488

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE ASSOCIATED CHRISTIAN CONCILIATION SERVICES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTION PRESENTED

Whether the First Amendment allows the state to intrude into the internal dispute resolution procedures required by the religious beliefs of a religious organization.

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BRIEF OF THE ASSOCIATED CHRISTIAN CONCILIATION SERVICES AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF AMICUS CURIAE

The Associated Christian Conciliation Services is a national membership organization providing a network for twenty-seven Christian Conciliation Services (CCS) throughout the United States, including the Christian Conciliation Service of Albuquerque, established in 1979, and the Christian Conciliation Service of Montana, incorporated as a nonprofit organization in 1982. In 1985, conciliation panels under the direction of the Associated Christian Conciliation Services heard approximately 2,000 separate disputes and worked to resolve each of these without recourse to civil litigation.

Each Christian Conciliation Service is a service arm of the church, working in cooperation with local church

bodies, individually and on an interdenominational basis without regard to specific ecclesiastical tradition, in various geographical areas, to assist them in resolving disputes solely within each church. Each is a ministry dedicated to enhancing the unity of Christian believers and to leading others to Christ through the teaching and encouraging of obedience to biblical peacemaking principles in church, legal, business, and personal disputes, assisting churches in the peaceful resolution of disputes and the reconciliation of those alienated by conflict, and encouraging attorneys to apply biblical principles in their practice of law.

The Associated Christian Conciliation Services is concerned with the right of ecclesiastical bodies to resolve internal matters and the right of religious persons to enter into binding arbitration, mediation, and conciliation contracts in accordance with their religious beliefs and convictions, all without interference from the state and civil authorities.

SUMMARY OF ARGUMENT

Internal dispute resolution procedures traditionally have existed within diverse ecclesiastical traditions for thousands of years. Internal dispute resolution procedures are critical to the obedience of the religious body to its religious requirements, to the maintenance of discipline and uniform compliance to its religious standards by its members, to the maintenance of unity within the religious community, to the protection of its reputation in society, and to the preservation of its distinctive religious identity. Within the Christian tradition, the ultimate purpose of the internal dispute resolution process is to bring reconciliation between the persons, not simply to settle a legal dispute.

The First Amendment requires the state to respect the internal dispute resolution procedures of religious bodies. In the present case, the state has become entangled in

matters which a religious group has sought to resolve internally. If the state is allowed to override the schools' internal dispute resolution policy, the right of all religious groups to practice internal dispute resolution procedures will be jeopardized.

ARGUMENT

I. INTERNAL DISPUTE RESOLUTION PROCEDURES WHICH TRADITIONALLY HAVE EXISTED WITHIN DIVERSE RELIGIOUS BODIES ARE REQUIRED BY THEIR SINCERELY HELD RELIGIOUS BELIEFS AND ARE ESSENTIAL TO THE PRESERVATION OF THEIR DISTINCTIVE RELIGIOUS COMMUNITY.

A. Internal Dispute Resolution Procedures within Religious Bodies Are Essential to the Maintenance of Religious Community.

In the words of Chief Justice Burger, "'[t]here must be a better way,'" than litigation, an alternative to "the time lapse, the expense, and the emotional stress inescapable in the litigation process." Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982). In recent years, with the rapid acceleration in the number of lawsuits filed and the resulting overload of the judicial system, the American legal community has begun to explore alternative methods of dispute resolution. See, A. Levin, *Dispute Resolution Devices in a Democratic Society* (1985); S. Goldberg, et al., *Dispute Resolution* (1985); *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79-246 (1976).

Internal dispute resolution procedures traditionally have existed within diverse ecclesiastical traditions for thousands of years. The persistent presence of such procedures attests to the fact that they are integral to various historic religious traditions. Accordingly, where such

practices are found within religious communities, they are to be respected as valid expressions of faith integral to church polity, dogma, and mission, and essential to the maintenance of religious community. In this country, internal dispute resolution procedures are found within the Jewish,[1] Roman Catholic,[2] Protestant,[3] and other[4] traditions.

The purposes and functions of these internal dispute resolution procedures vary among religious bodies or, within a religious body, among individual situations. Generally, internal dispute resolution procedures are critical to the obedience of the religious body to its religious requirements, to the maintenance of discipline and uniform conformance to its religious standards by its members, to the maintenance of unity within the religious community, to the protection of its reputation in society, and to the preservation of its distinctive religious identity.

The internal dispute resolution procedures generally are rooted in the holy writings of the religious body. For example, Jewish internal dispute resolution procedures can be traced to the counsel given to Moses when he was overwhelmed by the number of disputes among the Israelites. See *Exodus* 18:13-27; Columbia Note, *supra* note 1, at 50-51. The provision of such procedures

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[1] J. Yaffe, *So Sue Me!* (1972); Note, *Rabbinical Courts: Modern Day Solomons*, 6 Colum. J. Law & Soc. Probs. 49 (1970) [hereinafter cited as Columbia Note].

[2] Catholic Church, *The Code of Canon Law*, Can. 1400 *et seq.* (1983).

[3] *See, e.g.*, L. Buzzard & L. Eck, *Tell It To The Church: Reconciling Out of Court* (1982) (a description of the Christian Conciliation Service); J. Laney, *A Guide to Church Discipline* (1985); R. Kraybill, *Repairing the Breach: Ministering In Community Conflict* (1980) (a description of the Mennonite Conciliation Service).

[4] Swenson, *Resolution of Civil Disputes by Mormon Ecclesiastical Courts*, 1978 Utah L. Rev. 573 (1978) (a description of the 19th century Mormon ecclesiastical courts).

often is an act of obedience by the religious group. For example, Christian internal dispute resolution procedures are based on several biblical passages, including the direct command of Jesus Christ to settle disputes among believers by a three-step process: 1) the offended Christian should first meet privately with the Christian who has offended him or her; 2) if the problem remains unresolved, the offended person should take one or two witnesses to confront the offender; and 3) if the dispute is still unresolved, the offended person is to "tell it to the church" in order for the church to deal with the problem. *Matthew* 18:15-17. *See, e.g.*, I *Corinthians* 6:1-8; *Galatians* 6:1; *see also*, Laney, *supra* note 3, at 17-26.

Internal dispute resolution procedures are critical to the ability of the religious body to enforce its standards of conduct, not only to protect its members who are living consistently with those standards, but as importantly, to provide a means by which to help its members who are not living consistently with its standards to return to them. If a member of the body is not acting in accordance with the religious beliefs of the body, the internal dispute resolution procedures provide the means by which the member can be made aware of his or her departure from the religious standards of the community and be given an opportunity to explain the actions. The person then has the ability to decide whether to change the actions and be restored to the community. If the decision is not to change, he or she may leave the community, or the community may believe it necessary to remove certain privileges commonly held by members from that person. This procedure is outlined by Jesus Christ in *Matthew* 18:17, the passage cited in the teacher's contract and policy manual of Dayton Christian Schools, as part of the concept Dayton Christian Schools terms "the Chain of Command." See Buzzard, *supra* note 3, at 49-58.

Another key function of internal dispute resolution procedures is to maintain unity among the members of

the religious community. Even when members are living in accordance with the religious beliefs of the community, misunderstandings among members can occur. The internal dispute resolution procedures minimize the damage of misunderstandings by requiring the persons involved to speak directly to one another rather than to gossip to others. The principle of "giving a good report" required by Dayton Christian Schools in its teacher's contract and policy manual, based on *Matthew* 18:15-17 and *Galatians* 6:1, is an example of this function.

Internal dispute resolution procedures also protect the reputation of the religious body, its beliefs, and its members by requiring its members to settle their disputes within the religious community. For example, Christians are strongly admonished not to take their disputes with other Christians to secular courts but rather to submit their disputes to fellow believers. I *Corinthians* 6:1-8. This principle was cited by Dayton Christian Schools as part of the reason for its policy. *Dayton Christian Schools v. Ohio Civil Rights Commission*, 578 F. Supp. 1004, 1013 (S.D. Ohio 1984).

Very importantly, the internal dispute resolution procedures are essential if a minority religious body is to maintain its distinctive religious identity. Historically such procedures have protected minority religious groups from unsympathetic state courts that might substitute the ethics of the state, or even another religion, for the standards of conduct required by the minority religious group. See Columbia Note, *supra* note 1, at 52-55 (important function of Jewish courts in Middle Ages was to avoid discriminatory treatment in the state courts and to protect Jewish autonomy). This protective function is pertinent in the present case, since the state seeks to substitute its standards for those of Dayton Christian Schools regarding the religious standards of conduct required of its teachers.[5]

[5] Apart from the religious reasons for the procedures, the advantages of such internal dispute resolution within a religious group over dispute resolution in civil courts include speed, less expense, less specialized procedures, privacy and adjudication by members of the same minority group according to a value system the disputants already have agreed to follow. See Columbia Note, *supra* note 1, at 68-70. Noteworthy is the noncompulsory and voluntary nature of the individual member's choice to submit to the jurisdiction of the religious body, whether in formal or informal compliance with the required procedure. For example, the teacher at Dayton Christian Schools voluntarily contracted to abide by the internal dispute resolution procedures of the school. Furthermore, the character of dispute resolution within a religious body is generally more personal and less authoritarian than subjecting persons by subpoena to civil and secular judicial process.

Dispute resolution proceedings utilized by ecclesiastical bodies serve a variety of functions. The need for agreed procedures arises when divergent beliefs and/or practices threaten the unity of the religious body. Since the religious community is defined by the voluntary agreement of its participants to submit to spiritual authority in accordance with the objective norms given in its teachings, the failure to submit to such authority denies the ecclesiastical jurisdiction essential for the community to maintain distinctives, whether in dogma or practice.[6]

[6] It would be an oversimplication to focus solely on one important purpose of ecclesiastical dispute resolution procedures, namely, to do justice or to deal with moral defalcations of an offending member. The unity of such bodies first depends on the participants' voluntary submission to the objective norms of Holy Scripture and thus, derivatively, to its jurisdiction. Such submission can be withdrawn at any time but signals an end to the adherence to the norms and a cessation of participation in the community. The voluntary withdrawal of consent is both substantive and procedural. It is found in the present case when the teacher sought to resolve her grievance outside the procedures provided within the community. Her act, while not suggestive of moral offense necessitating discipline, was at least a denial of jurisdiction, and more importantly, illustrated to others her unwillingness to follow the same biblical norm by which they believed themselves bound. The combination of these significations meant that by her choice she was withdrawing from further participation with the community on the terms to which she had previously agreed. The position of the Ohio Civil Rights Commission is that the teacher is

B. The Ultimate Purpose of the Internal Dispute Resolution Procedures of the Associated Christian Conciliation Services Is to Bring Reconciliation Between Persons.

The internal dispute resolution procedures vary among the different religious groups. The conciliation ministries of the Associated Christian Conciliation Services follow a common procedure.[7] The ultimate purpose of the conciliation process is to bring reconciliation between the persons, not simply to settle a legal dispute. The conciliation ministries generally encourage the parties to use a combination of mediation and arbitration, which begins with substantial efforts through mediation and automatically proceeds to arbitration if mediation does not succeed.

As a first step in the internal dispute resolution procedures, the disputants' consent to mediation or arbitration is obtained. Often an exploratory meeting is held to explain to the parties the philosophy and purposes of conciliation, including the biblical teaching about reconciliation and the procedures indicated in *Matthew* 18 and I *Corinthians* 6.

Next, the parties decide who will act as mediators or arbitrators. The conciliation ministries maintain a list of lawyers and other Christian persons who have indicated a willingness to serve on a panel for mediation or arbitration. Often the panel chosen will consist of three persons, including a lawyer, a pastor, and a professional person who is specifically familiar with the subject matter involved in the dispute.

The disputants then prepare for the hearing by the panel. Generally they are required to complete a Bible

entitled to participate in the Dayton Christian Schools' community on her own terms separate and apart from the community's understanding of their common submission to scriptural principles.

[7] This procedure is discussed in more detail in Buzzard, *supra* note 3, at 77-84.

study entitled *Readiness for Reconciliation*,[8] designed to help the disputants examine their own commitments and spiritual lives so that the Spirit of Christ can move in the conflict in a healing way. This self-assessment process is critical to the whole purpose of the conciliation ministries. The disputants may submit relevant documents to the panel and may meet with the panel individually before the actual hearing is held.

The actual formal hearing will vary according to the nature of the dispute and the relationship of the parties. The hearing generally begins with an explanation of the procedure that will be followed. The spiritual significance of the hearing is underscored, particularly the importance of reconciliation and forgiveness among the disputants. Each disputant then has an opportunity to tell his or her story without interruption from the other disputant.

If mediation is successful, the parties will reach their own agreement. Often this agreement will be written to clarify what the parties have agreed to do and to avoid any further misunderstanding.

The conciliation ministries of the Associated Christian Conciliation Services often recommend that Christians who are entering a relationship with legal dimensions, whether it is a business venture or a marriage, contract to submit any future disputes to a Christian conciliation procedure. Given the contract between the teacher and Dayton Christian Schools to follow the procedures of *Matthew* 18, the present case could have a significant impact on such contractual provisions recommended by these conciliation ministries and on dispute resolution procedures followed by other religious groups. *See, e.g.*, Columbia Note, *supra* note 1, at 60-61 (religious dispute resolution procedures particularly useful in the area of teacher-administration disputes in the religious schools of

[8] Reprinted in Buzzard, *supra* note 3, at 95-120.

the Orthodox Jewish German Community in New York City).

II. THE FIRST AMENDMENT REQUIRES THE STATE TO RESPECT THE INTERNAL DISPUTE RESOLUTION PROCEDURES OF RELIGIOUS BODIES.

In the present case, the district court failed to accord the respect to the internal dispute resolution procedures of religious bodies that the First Amendment requires. The district court found that the teacher's contract required conformance with Dayton Christian Schools' religious beliefs in "the Biblical means of arbitrating disputes internally, never taking a dispute 'before a court of law'" and that the teacher acknowledged her concurring belief both when she applied for employment and when she signed the employment contract. 578 F. Supp. at 1032. The district court found that she violated this principle by consulting an attorney rather than resolving the dispute internally. *Id.* The district court recognized that, if the state were to conduct its investigation, the state, an outside party, would interject itself into the dispute resolution process of the religious school, despite the schools' demonstrated religious belief in internal dispute resolution. *Id.* at 1033. Despite its factual findings of a violation of the schools' religious belief in internal dispute resolution, the district court dismissed the violation by speculating that "[i]n all likelihood, the majority of disputes arising within the school will continue to be resolved internally" and "[f]or the most part, [Dayton Christian Schools] will continue to be free to believe and to practice their belief in the internal resolution of differences." *Id.*

In so holding, the district court ignored the teachings of this Court that the First Amendment protects internal dispute resolution procedures of religious organizations from state intrusion. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 709 (1976) (defrockment of bishop for refusal to accept decisions of governing ecclesiastical body); *Presbyterian Church* v. *Hull Church*,

393 U.S. 440 (1969); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Watson* v. *Jones*, 13 Wall. 679 (1872). The state cannot reject the decision of the body given authority within the religious group to settle disputes and "impermissibly substitute[] its own inquiry into church polity and resolutions based thereon of those disputes." *Milivojevich*, 426 U.S. at 708. In the present case, the state has sought to substitute its own judgment regarding the suitability of the teacher's continued employment for that of the schools' board of directors, which is specifically designated in the schools' constitution as the final board of appeals for problems between the schools and the teachers. J.A. 11.

As this Court has repeatedly explained, the state may not interfere with the internal dispute resolution procedures of a religious organization, particularly since the individuals have voluntarily consented to those procedures. Specifically this Court has stated:

> 'The right . . . to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. *It is of the essence of these religious unions*, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.'

Milivojevich, 426 U.S. at 711 (emphasis in original), *quoting*, *Watson*, 13 Wall. at 728-29. In the present case, the teacher specifically acknowledged her consent to the

internal dispute resolution procedures of the school in her application and in her employment contract with the schools.

This Court has recognized the danger of becoming entangled in matters that a religious group has sought to resolve internally. Unlike the present case, all parties sought state intervention in the dispute in *Milivojevich*, *id.* at 725-26 (Rehnquist, J., dissenting). Nonetheless, the Court prohibited state intervention recognizing that "there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Id.* at 709. This is precisely the danger in the present case. The state has judged the doctrinal positions of the schools to be incorrect and has sided in favor of the teacher who believes she is entitled to continue to be employed by the schools despite her violation of her contractual agreement to resolve disputes internally.

The district court justified its decision to allow the state to violate the religious schools' beliefs regarding internal dispute resolution on the weak reed that it is *only one* violation of the schools' religious practices. However, even a single instance of violation of religious autonomy in internal dispute resolution will have a chilling effect on the dispute resolution procedures of not only Dayton Christian Schools but other religious groups that practice internal dispute resolution. The vitality of similar contractual provisions and the finality of decisions by religious groups practicing internal dispute resolution will be severely undermined, unless the decision of the Sixth Circuit is affirmed.

CONCLUSION

Accordingly, *amicus curiae* urges this Court to affirm the judgment of the court below.

Respectfully submitted,

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February 5, 1986

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal From United States Court Of Appeals For The Sixth Circuit

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Americans United has a membership of some 40 thousand members of various religious beliefs and some of no religious belief in all states of the United States including the State of Ohio. Americans United is involved in extensive litigation of First Amendment free exercise and nonestablishment issues throughout the United States.

Americans United has been involved in most major Free Exercise and Establishment Clause cases coming before the United States Supreme Court, including such cases as: *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Estate of Thornton* v. *Caldor, Inc.*, 105 S.Ct. 2914 (1985); *Grand Rapids School District* v. *Ball*, 105 S.Ct. 3216 (1985); and *Aguilar* v. *Felton*, 105 S.Ct. 3232 (1985).

Americans United is particularly interested in the issues raised in this case because, although it has firmly stood for the separation of church and state, it likewise recognizes that the Religion Clauses of the First Amendment together are intended to preserve religious liberty including the freedom of church-related institutions.

SUMMARY OF ARGUMENT

Amicus Americans United contends that the Ohio Civil Rights Commission's assertion of jurisdiction over the Dayton Christian Schools and other similar pervasively religious institutions operating at the elementary and secondary levels would result in unconstitutional and impermissible government intrusion under the Religion Clauses of the First Amendment.

In order to pass constitutional muster under the Establishment Clause, a state statute or governmental act must reflect a purely secular purpose, have a primary effect

that neither advances nor inhibits religion, and avoid excessive entanglement with religion. A reasonable likelihood or probability of entanglement in this sensitive area is sufficient to render the statute or act unconstitutional.

This Court has repeatedly prohibited the use of tax funds to provide financial assistance to pervasively religious elementary and secondary schools partly because of the resulting entanglement and the inhibiting impact on religion.

This action was commenced by a pervasively sectarian school, its superintendent, as well as parents of children attending the church-sponsored school. Parents have the primary responsibility for the upbringing of their children including their education and religious nurturing. As a part of this parental right, parents may choose to send their children to a religiously-neutral public school or to a pervasively sectarian private school. Such a right, however, is meaningless if government is permitted to assert its influence or control over church-operated schools.

An even-handed approach suggests that the Religion Clauses may not only prevent tax funds from flowing to church institutions, but likewise shield against government dictation of their hiring and employment practices.

The involvement which the state here claims against the Dayton Christian Schools poses the substantial danger and potential for excessive governmental entanglement with religion and is therefore impermissible.

ARGUMENT

THE ASSERTION OF JURISDICTION OVER THE DAYTON CHRISTIAN SCHOOLS BY THE OHIO CIVIL RIGHTS COMMISSION IS AN IMPERMISSIBLE GOVERNMENTAL INTRUSION UNDER THE RELIGION CLAUSES OF THE FIRST AMENDMENT.

In *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the United States Supreme Court for the first time held that the Establishment Clause incorporated the principles of separation of church and state. Not only did the Establishment Clause prohibit an established religion and any preference among religions, but it went further and sought to isolate the affairs of government from the affairs of religion. The Religion Clauses of the First Amendment are largely the work of Thomas Jefferson and James Madison; they grew out of a conviction on the part of those two distinguished patriots that the union of church and state was destructive to both.

Most of the colonies had established churches, and it was the desire of many that establishment continue after independence from Britain. Patrick Henry introduced a bill in the General Assembly of Virginia "For the Support of Teachers of the Christian Religion." Madison instantly responded with his famous "Memorial and Remonstrance Against Religious Assessment" which, as this Court has recognized, is the foundation for the Religion Clauses of the First Amendment and a guide to their interpretation. The Court in *Everson* quoted Madison as stating:

> And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

Everson, 330 U.S., at 64-65.

This Court has in fact, subsequent to *Everson*, declared that it will "not tolerate either governmentally established religion or governmental intereference with religion." *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970). In *Walz*, *id.*, at 672, the Court recognized the importance of chartering a judicial course that "preserved the autonomy and freedom of religious bodies while avoiding any resemblance of established religion." It emphasized the necessity of clearly examining governmental actions to see if the government thereby becomes excessively involved in the affairs of the church.

In *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971), this Court called for the close scrutiny of the degree of entanglement when there is state involvement with religious institutions. Specifically the *Lemon* Court stated that "the objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Ibid.*

This Court has fashioned a three-prong test by which to judge the constitutionality of a statute or governmental act under the Establishment Clause of the First Amendment. In order to pass constitutional muster, a statute or governmental act must: (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-614 (1971); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973).

In *Lemon*, this Court said that it is enough to strike down a governmental regulation where "a reasonable like-

lihood or probability of entanglement exists." *Lemon*, 403 U.S., at 602. In a subsequent case, this Court spoke of the "substantial risk" of potential church-state conflict. *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472, 479-81 (1973).

The First Circuit Court of Appeals held unconstitutional government investigation of rising educational costs at church schools. *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979). In *Surinach* the court recognized that the government's ongoing powers necessary to ensure compliance with its orders and regulations, from compelling the keeping of records and the providing of testimony to the continuing inspection of papers and physical facilities, "[have] the self-perpetuating and self-expanding propensities which have alerted courts to an increased danger of an unconstitutional degree of entanglement." *Id* at 78. *See* also *McCormick* v. *Hirsch*, 460 F.Supp. 1337, 1357 (M.D. Pa. 1978). While *Surinach* was technically decided on "free exercise" grounds, it was decided on the basis of excessive entanglement.

This Court has repeatedly held that it is unconstitutional for there to be excessive entanglement with church administration. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). In *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 724 (1976), this Court held that the First and Fourteenth Amendments permitted religious organizations to establish their own rules and regulations for internal discipline and governance.

In *Lemon* v. *Kurtzman*, 403 U.S., at 620, this Court held that church-affiliated elementary and secondary schools are pervasively religious or sectarian thus preventing government grants to partially finance teachers of non-religious or secular subjects in such schools

because of the entangling surveillance that would be required. The Court stated that "[i]t is a relationship pregnant with damages of excessive government direction of church schools and hence churches." *Ibid*.

Subsequent to *Lemon*, a three-judge panel in *Public Funds for Public Education of New Jersey* v. *Marburger*, 358 F.Supp. 29, 33-34 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1973), stated:

> While in some instances it may be that religious values do not affect the content of the secular education provided by these institutions, it is clear that the purposes of such religious-affiliated schools is, in substantial part, to teach and thus advance a given religious faith. The Supreme Court has "long recognized that religious schools pursue two goals, religious instruction and secular education," *Board of Education* v. *Allen*, *supra*, 392 U.S. at 245, 88 S.Ct. at 1927; that, further, "the raison d'etre of parochial schools is the propogation of a religious faith." *Lemon* v. *Kurtzman*, *supra*, concurring opinion of Justice Douglas, 403 U.S. at p. 628, 91 S.Ct. at p. 2118. Accordingly, we are satisfied that the nonpublic schools which have participated in the New Jersey Aid to Nonpublic Schools Act are, and will be, for the most part, church-related or religious-affiliated educational institutions.

If an institution is "pervasively sectarian," *Meek* v. *Pittenger*, 421 U.S. 349 (1975), or indistinguishable from one which is, *Wolman* v. *Walter*, 433 U.S. 229 (1977), the Court must examine the resulting relationship between the government and the religious authorities and the potential for "political divisiveness, created by the program." *Lemon*, 403 U.S., at 615.

In *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), the Court stated:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard.

Id., at 226.

It should be noted that this action not only involves the Dayton Christian Schools but also Patterson Park Church, Christian Tabernacle, Dayton Christian Schools Superintendent Claude Schindler, and perhaps most importantly Steven and Camillia House, parents of children attending the Dayton Christian Schools. *Dayton Christian Schools* v. *Ohio Civil Rights Commission*, 766 F.2d 932, 935 (6th Cir. 1985).

The court of appeals in this case indicated that it focused substantial judicial attention in this action on "the fundamental rights of Steven and Camillia House, as parents, to choose the manner in which their children will be educated, especially with regard to religious values. *Id.*, at 947.

This Court has clearly articulated the legal responsibilities and privileges of parents in the rearing of their children. In *Parham* v. *J.R.*, 442 U.S. 584 (1979), the Court observed:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course. Our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and

> prepare [their children] for additional obligations" [citations omitted].

Earlier this Court in *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944), declared:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom includes preparation for obligations the state can neither supply nor hinder.

In the landmark compulsory school attendance case involving the Amish, this Court discussed the primacy of the parent:

> [T]his case involves the fundamental interest of parents, to guide the religious future and education of their children, this primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American institution.

Wisconsin v. *Yoder*, 406 U.S. 205, 232 (1972).

Clearly, current American constitutional concepts recognize that in the upbringing of a minor, the parent has the right and duty to guide his or her religious future. The importance of this concept is underscored by reference to earlier English practice. Parents in English history, which forms the past of our legal tradition, did not always enjoy primacy in the determination of the religious upbringing of their children. The English courts applied the doctrine of *parens patriae*, which literally translated means "father of his country" and in England refers to the King.

During the Sixteenth Century when the doctrine of the divine right of the King was in full force, and the King could do no wrong, the state did exercise absolute will over the religious upbringing of its minor subjects. As

early as 1590 the Elizabethean government of England sought the suppression of Catholic education. By 1723 an English court actually deprived a widow of the custody of her minor children so that they might be brought up Protestants. In 1724 an English court ordered the separation of a mother and her seven-year-old child even though the Catholic mother was raising her child as a Protestant according to the wishes of her late husband. Freedman, *The Parental Right to Control the Religious Education of a Child*, 29 Harv. L. Rev. 485 (1916).

A parent's interest in the religious upbringing of a child is obvious. In the Judeo-Christian tradition, a parent teaches a child the law of God because scripture imposes that duty upon the parent as the parent's personal obligation for the parent's own salvation. In addition, a parent exercises a power which he holds in trust for his child believing that learning God's law is beneficial to the child and necessary for the child's salvation. *Id.*, at 486.

Under a government where the state is prohibited from engaging in the religious instruction of its young people, the spiritual needs of children can only be met by the parent and the church. The denial to a parent of the right to control the religious upbringing of a child, is a denial of the parent's right to the free exercise of religion, at least as against the claim of the state.

Justice Brennan, in his concurring opinion in *Schempp*, 374 U.S., at 242, said:

> Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district . . . . In my judgment, the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures, the choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election.

If one accepts this concept that the state may not limit the liberty of the private school in the carrying out of its role as it attempts to inculcate religious and other values and conversely public education must be free from sectarian pressures, then the role of government in its influence over private school operations must be narrowly limited.

The assertive role of the state over private education is all the more subject to boundaries and limits when that private school is church-operated. Education has historically been a primary function of many churches and is an integral part of the Judeo-Christian religious tradition. In *Meek* v. *Pittenger*, 421 U.S., at 366, this Court noted that "the very purpose of many . . . [sectarian] schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and beliefs."

If a church-operated school is an integral aspect of the church ministry, it should be entitled to the same constitutional protection as other parts of the ecclesiastical program of the church. If parents are morally and consti-

tutionally free to choose the environment of their childrens' educational process, and the public schools are to be insulated at least to a large extent from sectarian pressure, there should be the widest latitude, consistent with health and safety regulations, granted to the parochial schools in its operation and control. As the Court noted in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639 (1943):

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

The Seventh Circuit Court of Appeals, in dealing with the question of the claimed right of the National Labor Relations Board to assert its jurisdiction over Catholic lay teachers, stated:

> A church which chooses to educate its own young people in schools which it is required essentially to finance without governmental aid should because of the essentially religious permeation of its curriculum be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Relations Act in conducting the teaching programs of those schools.

Catholic Bishop of Chicago v. *NLRB*, 559 F.2d 1112, 1130 (7th Cir. 1977). The Seventh Circuit further correctly observed that "an even-handed approach to justice might seem to suggest that the Religion Clauses, serving as they do as a buckler to stop financial aid to these schools should not now be any less effective to ward off the inhibiting effect of the governmental regulation here involved." *Id.*, at 1131.

Justice Douglas, in his concurring opinion in *Lemon* v. *Kurtzman*, 403 U.S., at 636, recognized the limitation upon government in interferring with the church control of hiring and firing of teachers. Justice Douglas, quoting from L. Bottner, *Roman Catholicism*, 375 (1962), stated:

> "[I]n the public school the selection of a faculty and the administration of the school usually rests with a school board which is subject to election and recall by the voters, but in the parochial school the selection of a faculty and the administration of the school is in the hands of the bishop alone, and usually is administered through the local priest. If a faculty member in the public school believes that he has been treated unjustly in being disciplined or dismissed, he can seek redress through the civil court and he is guaranteed a hearing. But if a faculty member in a parochial school is disciplined or dismissed he has no recourse whatsoever. The word of the bishop or priest is final, even without explanation if he so chooses.[1] The taxpayers have a voice in the way their money is used in the public school, but the people who support a parochial school have no voice at all in such affairs."

Prophetically, Justice Brennan, in *Lemon* v. *Kurtzman*, *id.*, at 651, observed that "when a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admissions policies and faculty

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[1] It may be noted that the *Code of Canon Law* currently provides as follows:

> Can. 805 In his own diocese, the local Ordinary has the right to appoint or to approve teachers of religion and, if religious or moral considerations require it, the right to remove them or to demand that they be removed.

selection." He then observed that the district court in *DiCenso* had pinpointed the dilemma, stating:

> "Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies, and in the hiring and firing of teachers. At some point the school becomes 'public' for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause. "316 F.Supp. at 121-122 (citations omitted)."

Justice Douglas, after observing that *Lemon* involved a state statute that prescribes that courses in mathematics, modern foreign languages, physical science, and physical education "shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect," *id.*, at 636, then concluded that as to those statutory requirements;

> It places the State astride a sectarian school and gives it power to dictate what is or is not secular, what is or is not religious. I can think of no more disrupting influence apt to promote rancor and ill-will between church and state than this kind of surveillance and control. They are the very opposite of the "moderation and harmony" between church and state which Madison thought was the aim and purpose of the Establishment Clause.

Id., at 637.

In *Aguilar* v. *Felton*, 105 S.Ct. 3232, 3239 (1985), this Court expressed its concern when agents of the state had to make numerous judgments on "matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations." This Court, agreeing with the conclusion of the Court in *Lemon*, concluded that "[a]s government agents must

make these judgments, the dangers of political divisiveness along religious lines increase."*Ibid.*

The state cannot have it both ways. If an institution is too sectarian to receive public funds, it should be free of the entangling involvements inevitably arising from the state's assertion of jurisdiction over matters of governance. The court of appeals in this case indicated that the greater the religious permeation within an educational institution, the greater also the degree of entanglement which may occur when the state involves itself in the operations of the institution. *Dayton Christian Schools* v. *Ohio Civil Rights Commission*, 766 F.2d, at 958.

We believe that the court of appeals correctly noted that the character of the activity which the state here seeks to affect—that is the employment of the teaching staff—by necessity involves the state in regulating ideological resources of the school and therefore by necessity implicates religious concerns. *Id.*, at 958.

The type of involvement which the state seeks to impose upon a pervasively religious institution by necessity creates a continuing relationship rather than a one-time, state-church encounter, *ibid*, and may well place the state in the position of deciding "questions of intent, motive, causation, and pretext necessarily involv[ing] the state in assessing religious decisions." *Id.*, at 959. The court, citing *Lemon* v. *Kurtzman*, 403 U.S., at 620, observed that such state involvement "is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."

Interference with the "independence of the institutions" is a wrong which Justice O'Connor warned against in her concurring opinion in *Lynch* v. *Donnelly*, 104 S.Ct.

1355 (1984). She stated that government can run afoul of the Establishment Clause by "excessive entanglement with religious institutions, which may interfere with the independence of the institutions. . . ." *Id.*, at 1366.

State control of any important aspect of the governance of a church-operated educational institution designed to perpetuate the faith among its young "undermines the purpose of religious instruction and denigrates the institution's ability to convey freely religious ideals within its own walls and to integrate these values with education." *Wamble* v. *Bell*, 598 F.Supp. 1356, 1373 (W.D. Mo. 1984). This Court, citing *McCollum* v. *Board of Education*, 333 U.S., at 212, has as recently as *Aguilar* v. *Felton*, 105 S.Ct., at 3237, declared that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." The Establishment Clause objective of preventing so far as possible the involvement of either the state or the church in the prerogatives of the other would be violated if the state were permitted to countermand a decision of pervasively religious educational institutions in the hiring or termination of those central to the educational ministry—the teachers.

CONCLUSION

For the reasons set forth herein, the judgment of the Sixth Circuit Court of Appeals is consistent with the requirements of the Religion Clauses of the First Amendment and should be sustained.

Respectfully submitted,

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Dated: February 5, 1986

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

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On Appeal From United States Court Of Appeals For The Sixth Circuit

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-488

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal From United States Court Of Appeals For The Sixth Circuit

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. Included in its purpose is the protection of the principles of church-state separation and opposition to any encroachment by government agencies which would inhibit the free exercise of religion.

The Board of Directors of the Council of Religious Freedom is composed of individuals who are active in church affairs, some in official church responsibilities, and some as lay leaders, but all recognize the importance of preserving the separation of church and state to ensure religious freedom and autonomy for all church organizations.

Members of the Council on Religious Freedom are individually involved in religious education and hold to the view that such education is an integral part of the ministry of the sponsoring church. For that reason the Council brings to this Court special insight as to the purpose and function of church-operated elementary and secondary schools which will be directly affected by the decision of this Court in this case.

SUMMARY OF ARGUMENT

The action of the Ohio Civil Rights Commission asserting its jurisdiction concerning the termination of a teacher employed by the Dayton Christian Schools directly implicates the religious concerns of an admittedly pervasively religious elementary and secondary school. Directly involved are the school's teachings and beliefs that a mother's place is in the home and that the Bible requires employees of a religious ministry to follow a God-ordained process in the settling of disputes.

The State attempts to dissect the religious beliefs advanced by the Dayton Christian Schools in explanation of its actions which resulted in the termination of one of its teacher's employment for the apparent purpose of determining which part of the school's policies and actions are religious.

However, it is not the government's prerogative to dictate that a religious practice of one group is not entitled to protection under the First Amendment.

In applying the free exercise balancing test, repeatedly utilized by this Court, the Court must find that the State has established a compelling reason for applying a law without exemption respecting the individual or religious organization whose beliefs or practices are burdened by the law. In addition, even if such a compelling state interest is found to exist, the Court still must find that there is no less intrusive means available to meet the compelling interest of the State. The record in this case demonstrates a failure upon the part of the State to meet this burden.

No agency of the State should be permitted to interpose itself between a religious ministry and its employees except upon a clear and convincing showing of a compelling governmental interest and the absence of a less intrusive alternative.

Contrary to the State's contentions, the Dayton Christian Schools did not lose its spiritual character or purpose upon entering an area of activity such as the providing of religious education.

Education has historically been a church responsibility, and the State has only lately claimed the right of involvement. Christian education, although sharing its educational concerns with public education, becomes no less a religious ministry as a result of its teaching process including what the state refers to as "secular" subjects. The church-operated school, such as Dayton Christian Schools, teaches all of its courses with a sectarian view and purpose. Its goal in major part is to inculcate religious values and beliefs.

The free exercise claim of a church-operated school is not dependent upon whether its employees are "ordained ministers" but rather depends on the nature of the primary duties held by the teaching staff. The Ohio Civil

Rights Act thus burdens appellees' right to the free exercise of religion because the application of this legislation interferes with the teaching ministry of the sponsoring churches.

ARGUMENT

INTRODUCTION

Appellants contend that the application of the Ohio Civil Rights Act does not violate the Free Exercise Clause as applied to the Dayton Christian Schools (DCS). Appellants, however, do acknowledge that "DCS generally fits the profile of the pervasively religious school well known to this Court through the cases involving the states' effort to provide monetary support to the secular functions of church-related elementary and secondary schools, . . ." (Appellants' Brief at 33).

Appellants acknowledge that DCS resisted the Commission's exercise of jurisdiction on the grounds that the actions taken were related to the school's belief that the Bible ordains differing roles for men and women and its belief in a Biblical Chain of Command philosophy. The State of Ohio specifically declares that it does not claim that the application of the State's civil rights statute would fail to implicate the school's religious beliefs. The State also indicates that it does not contend that the beliefs are not significant or sincerely held or that the beliefs themselves are not entitled to constitutional protection (Appellants' Brief at 17). The State, however, does maintain "that the burden imposed upon the practice of these beliefs, as a result of the application of the Act, is permissible because of the nature of the institution involved and the overwhelming importance of the State's objective in seeking to eradicate discriminatory conduct based upon immutable characteristics such as sex or race." (*Id.* at 17).

The focus of this amicus brief will therefore be on the Free Exercise Clause as it involves a pervasively religious elementary or secondary school.

I. THE ACTION TAKEN BY DAYTON CHRISTIAN SCHOOLS DIRECTLY IMPLICATES RELIGIOUS AS DISTINGUISHED FROM SECULAR CONCERNS FOR WHICH IT IS INSULATED FROM STATE INVOLVEMENT

The State attempts to separate the church from its educational ministry contending that DCS is not a church, a seminary, or a Sunday School; that "DCS' activities, although pervasively religious, fall on a different tier than religious worship or purely religious instruction." (Appellants' Brief at 17.) The State supports its position by maintaining that DCS is a full-scale elementary and secondary school chartered by the State which provides secular, as well as religious, instruction as an alternative to the public schools.

For this reason, according to the State, such school "falls at the intersection between purely religious and purely secular activity." (*Ibid.*) The State further asserts that "[a]s a private corporation created for the purpose of providing secular, as well as religious education, DCS has entered a world that goes beyond purely personal conduct or purely religious concerns. DCS has entered a field of particular state concern and traditionally subject to extensive regulation." (*Id.*, at 18-19).

In its opinion, the Sixth Circuit Court of Appeals noted that the district court had determined that DCS has "a dominant religious purpose which permeates both the administrative and substantive aspect of the school." *Dayton Christian Schools, Inc.* v. *Ohio Civil Rights Commission*, 766 F.2d 932, 936 (6th Cir. 1985). The court

of appeals observed that the testimony at the hearing and the exhibits accepted into evidence demonstrated that "the teachers at DCS are selected because of their ability to blend their avowed religious beliefs into every lesson and school activity." *Ibid.* The Sixth Circuit also determined that "the school demands that teachers conform both in thought and conduct to the tenets and principles felt essential to leading a Christian life." *Ibid.* Also, that court stated that "[t]he belief system espoused by the members of DCS touches every aspect of their life: work, interpersonal relationships, family and recreational activities." *Ibid.* Important to DCS was the fact that "[d]eviation in any way from what is felt to be the proper religious way of life may cast doubt on a teacher's ability to perform his or her critical role and may, therefore, be grounds for dismissal." *Ibid.*

The Sixth Circuit found that the teacher selection process was important in arriving at its decision. The court quoted from DCS Superintendent Claude Schindler, stating:

> Schindler testified that "[t]he teacher's relationship with Jesus Christ and their life style is crucial to their subsequent employment at Dayton Christian Schools." Further, "[w]e feel that a teaching position is so crucial in our school and so vital to the performance of our ministry, that . . . [b]efore we make the recommendation to the board to hire our teachers, we must be in total harmony about the teacher's commitment to Christ and her life style and her ability to teach in our system."

Id., at 937.

The court of appeals further reviewed the testimony of a DCS teacher and concluded that the facts supported the district court's conclusion "that DCS is a pervasively

religious institution in which religious considerations permeate all aspects of the educational process, govern the teacher selection process and dictate parents' entrustment of their children's education in the school." *Id.*, at 938.

The court noted that the Ohio Civil Rights Commission's complaint of discrimination implicates two asserted religious beliefs of appellants: (1) the belief that a mother's place is in the home and (2) the belief in a Chain of Command for resolving disputes among church members. *Ibid.*

The Sixth Circuit concluded that the Chain of Command "is a Biblically based authority structure which depends on the internal peaceful resolution of differences." *Id.*, at 939. The court further observed that "[t]he district court found that 'Hoskinson [the terminated teacher] was aware of the requirement that all teachers follow the Chain of Command prior to consulting her attorney and prior to her discharge.'" *Id.*, at 940. The court of appeals further observed that "[t]he district court found that the Chain-of-Command concept 'is both well articulated and generally held and ascribed to by the DCS staff and administration.'" *Ibid.*

Appellants counter with the claim that "[t]he endeavor to end discrimination certainly would be fruitless if persons seeking redress under the anti-discrimination laws were not protected from retaliation for taking such action." (Appellants' Brief, at 25). The appellate court noted that the Chain of Command concept which DCS construed as prohibiting Hoskinson from consulting an attorney was contained in § 13 of the contract between Hoskinson and Dayton Christian Schools and provides:

> The teacher agrees to follow the Biblical pattern of Matthew 18:15-17[1] and Galations 6:1[2] and always give a good report. All differences are to be resolved by utilizing Biblical principles—always presenting a united front.

Id., at 934, n.3.

The concept of Christian conciliation, as embraced in Matthew 18:15-17 is a doctrinal interpretation embraced by many religious organizations and Christians.[3] The

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[1] Matthew 18:15-17 reads as follows:

> 15. Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother.
>
> 16. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established.
>
> 17. And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican.

[2] Galations 6:1 provides as follows:

> Brethern, if a man be overtaken in a fault, ye which are spiritual, restore such an one in the spirit of meekness; considering thyself, lest thou also be tempted.

[3] *See* Fred Cassity's article entitled "Christian Mediation: God's Love in Action" as produced in the *Journal of Christian Jurisprudence* (1980) referring to Matthew 18:15-17, which states:

> As Christians, we are not to go to the state for justice: rather, we are commanded to go to the church. In fact, we Christians are to suffer a wrong at the hands of a brother rather than to go to the civil authorities.

Id. at 165-166.

Lynn R. Buzzard and Samuel Ericsson in their book entitled *The Battle for Religious Liberty* (1982) also discuss the biblical conciliation requirement:

> We have touched on the legal approach to resolving disputes within the church. Yet there seems to be a better way—in fact, a biblical way—to handle such disputes. The alternative is identified by Christ in Matthew 18 (versus 15-18) and by Paul in 1 Corinthians 6: tell it to the church. Let the matter be resolved within the church rather than through the secular courts.
>
> Paul is very blunt about Christians suing one another. He asks in 1 Corinthians 6, "How dare you sue one another?" Paul is dealing with the reproach Christians bring to Christ's name when they sue one another in secular courts. Christ said that the world would know us as his disciples by the love we have one for another. Yet, what is the world to believe when they see these "loving" Christians fighting it out hammer and tong in the courts?

Id., at 263.

The *Seventh-day Adventist Church Manual* discusses the conciliation process under the title "Safeguarding Unity of the Church" as follows:

> Every effort should be made to settle differences among church members and contain the controversy within the smallest possible sphere. "Contentions, strife, and lawsuits between brethern are a disgrace to the cause of truth. Those who take such a course expose the church to the ridicule of her enemies and cause the powers of darkness to triumph. They are piercing the wounds of Christ afresh and putting Him to an open shame. By ignoring the authority of the church they show contempt for God, who gave to the church its authority." *Testimonies*, vol. 5, pp. 242, 243.
>
> Civil litigation is often carried on in a spirit of contention that results from and reveals human selfishness. It is this kind of adversary proceedings that must be discouraged by a church that seeks to exhibit the spirit of Christ to "suffer . . . [themselves] to be defrauded" (1 Cor. 6:7) rather than to "go to law before the unjust, and not before the saints." (1 Cor. 6:1).

Id., at 241-242.

Dayton Christian Schools contends that the teacher did not follow the Biblically required process of conciliation as outlined in Matthew 18:15-17.

The issue is therefore joined between a religious organization attempting to follow Biblical principles and requiring those who it employs to observe these concepts, and a state interpreting such reaction from a religious organization employer to be merely retaliatory conduct.

This Court has long recognized that civil authorities should avoid, to the greatest extent possible, involvement

in ecclesiastical affairs. As early as 1872, this Court in *Watson* v. *Jones*, 80 U.S. 666, 672-679 (1872), determined that civil courts should refrain from deciding matters involving ecclesiastical affairs.

In *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952), the Supreme Court elevated to the status of a constitutional principle the *Watson* rule of deference to ecclesiastical tribunals. The Court in *Kedroff* also stated that "[f]reedom to select the clergy . . . must be said to have federal constitutional protection against state interference." *Id.*, at 116.

The constitutionally-rooted deference of state authority to church authority on matters of ecclesiastical concern has been subsequently reaffirmed by this Court. *Presbyterian Church in the United States* v. *Mary E. B. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976).

In *Fowler* v. *Rhode Island*, 345 U.S. 67, 69-70 (1953), this Court stated that it is not the business of the courts to say what is a religious practice for one group is not religion under the protection of the First Amendment for another. The action of DCS in terminating the teacher for violating the Chain of Command requirement of the contract which was both Bible-based and a religious belief of the Christian school, to which the teacher had indicated her commitment, thus pits the State and a religious organization against one another on a religious issue.

The balancing test to determine whether a state interest should prevail over a free exercise of religion claim was set forth in a several part balancing test announced by this Court in *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

In its opinion, this Court, in considering the competing interests, set forth the following test:

1. Is there a burden imposed on the exercise of religion? *Id.*, at 403.

2. If there is such a burden, is the infringement justified by a compelling governmental interest? *Id.*, at 406.

3. Even if a compelling governmental interest has been shown to exist, is there any less intrusive means available to meet the state's objective? *Id.*, at 407.

The Court in *Sherbert* made clear that not every governmental interest will over balance a free exercise claim. The interest must be shown to involve a grave and paramount state concern. *Id.*, at 405.

One of the most significant post-*Sherbert* decisions is this Court's ruling in *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972), wherein the Court, citing *Sherbert*, held that there must be a state interest of significant magnitude to override a claim to protection under the Free Exercise Clause:

> The essence of all that has been said and written on the subject is that only those interests of the highest order can over balance legitimate claims to the free exercise of religion.

In *Yoder*, the Court upheld the right of Amish parents to remove teenaged children from the public schools and held unconstitutional, as applied to members of the Amish religion who have graduated from the eighth grade, the provisions of the State's compulsory education laws. In that case, the State advanced a number of arguments seeking to meet its burden of establishing a compelling state interest. This Court, however, rejected each argument and pointed out that the alleged overriding

interests of the State must be carefully and sensitively examined.

The specific meaning of "compelling state interest" becomes clearer from other cases following *Sherbert*. In *In re Jenison*, 375 U.S. 14 (1963), a case involving religiously-based objection to jury service, this Court vacated and remanded the judgment of the Supreme Court of Minnesota to consider the case further in light of *Sherbert* v. *Verner*. Upon reconsideration, *In re Jenison*, 267 Minn. 136, 125 N.W.2d 588 (Minn. 1963), the Minnesota court held that there was an inadequate showing that the State's interest in obtaining competent jurors required the court to override the claim as to the free exercise of religion. This case did not hold that there was no compelling state interest in obtaining service of jurors, but rather it held that there was no such interest in compelling 100% enforcement of such a requirement against a religious objector.

As the Wisconsin Supreme Court stated in *State* v. *Yoder*, 49 Wis.2d 430, 438, 182 N.W.2d 539, 542 (1971):

> A compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation.

The Wisconsin Supreme Court further held on the authority of *Sherbert* and *In re Jenison*, that an exemption for the Amish would not defeat the purpose of compulsory education.

Professor Laurence Tribe addressed the subject in this manner:

> In applying the least restrictive alternative-compelling interest requirement, it is crucial to avoid the error of equating the State's interest in denying the exemption with the State's greater interest in maintaining the underlying rule or program for unexceptional cases. Only the first interest—that in denying an exemption—is constitutionally relevant when an exemption is sought.

Tribe, *American Constitutional Law*, 855 (1978).

In *United States* v. *Crawthers*, 456 F.2d 1074, 1080 (4th Cir. 1971), the Fourt Circuit stated:

> [T]he Supreme Court has made it clear that laws which regulate activities protected by the First Amendment must be more than merely rational, and are not accorded the presumption of constitutionality normally accorded to acts of the legislature [citations omitted] . . . . [A]nd to abridge this activity the government must have a compelling interest to justify the abridgement and the scope of the abridgement must not be greater than reasonably necessary to serve the government's purpose. *Thomas* v. *Collins*, 323 U.S. 516, 530; 65 S.Ct. 315; L.Ed. 430 (1945).

The *Sherbert* test requires that the government prove that there is no less restrictive alternative available. In *Shelton* v. *Tucker*, 364 U.S. 479 (1960), this Court struck down a state statute requiring teachers to file affidavits listing the organizations to which they belonged. The Court in *Shelton* found that even though the governmental purpose may have been legitimate and substantial, that purpose could not be attained by means that infringed upon fundamental liberties if a less intrusive method were available. The Court in *Shelton* said: "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.*, 488.

The court of appeals appropriately applied the *Sherbert* test when it stated that "[t]he Ohio Civil Rights Act places a heavy burden on appellants' exercise of their

religious beliefs, and, although the state's interest is substantial, that interest does not justify such a broad and onerous limitation." *Dayton Christian Schools* v. *Ohio Civil Rights Commission*, 766 F.2d, at 954.

This Court in *Lynch* v. *Donnelly*, 104 S.Ct. 1355, 1359 (1984), clearly announced that the First Amendment "affirmatively mandates accommodation, not merely tolerance." In this case, the court of appeals opined:

> Accommodation of the religious beliefs in this case would not significantly interfere with the state's fulfillment of its goal of eradicating discrimination in employment. The state would still be able to regulate all employment practices of non-religious institutions and would be able to regulate the employment practices of religious institutions except where religious belief is implicated. Further, it is clear that less burdensome alternatives such as the denial of tax exemptions as in the *Bob Jones University* case or denial of the use of public school bus transportation are available to help the state accomplish its goal while reducing interference with the exercise of religion. While the record reveals that bus transportation is the only public benefit DCS claims to receive, Ohio Rev. Code Ann. §3327.01, it is clear that state law provides several other benefits such as textbooks, speech and hearing diagnostic services, physician, nursing, dental and optometric services, and diagnostic psychological services, Ohio Rev. Code Ann. §§3317.02.4 (P), 3317.06.

Id., at 955.

The requirement of state accommodation for the religious concerns of DCS should take on greater importance here where the accommodation required directly involves an employee who has agreed to abide by the religious beliefs and practices of the Dayton Christian Schools. The complaining teacher did not merely enter

the secular work place, but rather sought employment from an employer which she well understood was primarily concerned with transmitting its religious beliefs and values.

This *amicus* believes that the nature of the institution is a key factor in determining whether there is a compelling state interest in subjecting the organization to State Fair Employment Practice jurisdiction, as well as whether there is any less restrictive alternative. The Religion Clauses of the First Amendment envisage broad objectives premised upon a general colonial fear of sovereign intrusion into religious areas. This Court expressed its concern for the zealous protection of religious liberty when it suggested that the First Amendment "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government, as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

No governmental agency should, except upon a clear and convincing showing of a compelling governmental interest and the absence of any less intrusive and entangling alternative, ever interpose itself between the church and its ministries and those employees closely connected with the operation of the religious organization and serving in response to a religious calling.

II. A SCHOOL SUCH AS THE DAYTON CHRISTIAN SCHOOLS IS AN INTEGRAL PART OF THE MINISTRY OF THE CHURCHES SUPPORTING SUCH EDUCATIONAL INSTITUTION

The State would have this Court view DCS actions as if it were merely another communal society. Professor Carl

H. Esbeck recently wrote in *Establishment Clause Limits on Governmental Interference With Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 371 (1984):

> As we have seen, however, the principle of separation arose not from the prudential reasoning characteristic of the sociopolitical rationale but from a natural rights view as evidenced in eighteenth century political thought. The natural rights theory argues from higher ground; namely, there are certain inalienable rights which cannot legitimately be denied. *The theory holds that religious organizations are different from other communal societies and that this uniqueness is critical to understanding the First Amendment.* For example, although the Amendment deals only by implication with associational rights, the establishment clause takes specific account of religious organizations through the separation requirement. The separation, of course, is of government and religious organizations, not government and individuals holding religious beliefs (the latter being an impossibility). The place of religious institutions, therefore, has long been recognized as a special problem for which the establishment clause makes special provision. [Emphasis added]

In *Aguilar* v. *Felton*, 105 S.Ct. 3232, 3237 (1985), this Court, expressing its concern regarding the state becoming too closely entangled with church administration, said:

> [T]he freedom of . . . the adherents of the denomination is limited by the governmental intrusion into sacred matters. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Board of Education*, 333 U.S. 203, 212, 68 S.Ct. 461, 465, 92 L.Ed.2d 649 (1948).

The State here attempts to distinguish between the preaching and educational ministries of a church. *Amicus*, however, believes that the educational ministry is part of the church's evangelistic outreach. This Court has said: "The right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions. . . ." *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978).

In *Lemon* v. *Kurtzman*, 403 U.S. 602, 626, 628 (1971), this Court observed that: "the raison d'etre of parochial schools is the propogation of a religious faith." Recently, in *Aguilar* v. *Felton*, 105 S.Ct. 3232, this Court spoke of pervasively sectarian schools as being "an integral part of the dominant sectarian mission," *id.*, at 3238, and referred to religious schools "which ha[ve] as a primary purpose the advancement and preservation of a particular religion." *Id.*, at 3239.

It is clear that those religious organizations that sponsor parochial or religious schools believe that they are involved in an integral part of the ministry of the church. This Court in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 784 (1981), noted that both male and female teachers of the Wisconsin Evangelical Lutheran Synod "receive a divine, life-long call" to the church, and "male teachers (teaching ministers) have equal status in the church and an equal vote on Synod matters, including matters of doctrine, with preaching ministers."

In this case, the State of Ohio is attempting a subtle type of governmental intrusion which is perhaps the most pernicious of all. Appellants are attempting to cleave the school from the church. Today one of the great concerns sweeping ecclesiastical circles is the attempt of government to define the mission of the church—to determine what, in the judgment of a bureaucrat, is religious and

what is secular, to determine what lies within the ministry of the church. The State has often attempted by definition to delete from ecclesiastical concern functions which historically have been a function of the church. *See*, *Espinsosa* v. *Rusk*, 634 F.2d 477 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982).

A California Supreme Court justice in a dissenting opinion astutely observed that freedom of religious thought and action "cannot be whittled away by carving out segments of religious activities and relegating them to the realm of secular affairs. If that were permitted, the right of action for a religious purpose could eventually be destroyed by the gradual severance and classification as secular of every activity undertaken to promote religious purpose." *Gospel Army* v. *City of Los Angeles*, 27 Cal. 2d 232, 163 P.2d 704, 719 (Cal. 1945). (Carter, J., dissenting).

In its brief, the State suggested that DCS by becoming involved in providing secular and religious education "has entered a world that goes beyond . . . purely religious concerns." (Appellants' Brief, at 18-19). Contrary to the State's view, it is the State—not religion—that is "johnny come lately" in the field of education. Education historically has been an important and integral part of religious ministries and is an integral part of the Judeo-Christian religious tradition. A canon attributed to the Sixth Ecumenical Council of Constantinople in 1680-81 A.D. required priests to maintain schools for children. J. Bingham, *The Antiquities of the Christian Church*, Book 8, Ch. 7, § 12 (1856). History and tradition may be important factors in any balancing of state ecclesiastical interests. *Wisconsin* v. *Yoder*, 406 U.S. 205, 209-213, 225-227 (1972).

In the *Resource Bulletin For Standards And Requirements* published by the Board of Parish Education, The

Lutheran Church-Missouri Synod in an article entitled "The Teaching Ministry A Unique Profession," (1969), Erich Helge writes:

> The teaching ministry is unique! It has some characteristics common to other professions, but it also has significant differences and it is those differences that make the Lutheran teacher unique in American society.
>
> * * *
>
> The profession of the teaching ministry is a function of the office of the holy ministry. . . . The preaching ministry, the missionary ministry, and the teaching ministry are examples of special functions within the holy ministry. The same applies to the professional workers in the ministry. All are professional ministers with special functions. The teaching minister and the preaching minister are more closely related professionally than the teaching minister and the public school teacher. . . .

Id., at 11.

This Lutheran publication further states:

> God requires total commitment from those whom He has called. The commitment is to Him and to His work. While this responsibility is given to all Christians, a special measure of trust is given to the professional worker. The concern of the teaching minister is for the spiritual welfare of others. When Christ appeared to Peter after the resurrection, He challenged Peter's love three times. After each positive response, He commanded Peter to "Take care of My lambs," or "Take care of My sheep." At the end of the conversation Jesus said to him, "Follow me!" (John 21:15-19 *The New Testament in Today's English Version*). The task of today's professional minister is the same. The same directive "Follow Me!" is still applicable. There are no strings attached. The

application of the directive is the only thing that has changed.

Id., at 12.

Further, at the 52nd regular convention of the Lutheran Church-Missouri Synod held in Dallas, Texas, in 1977, resolution 7-18 was adopted and stated as follows:

> WHEREAS, the Synod continually attempts to increase its effectiveness in carrying out its mission and ministry through Christian nurture; and
>
> WHEREAS, the *Handbook* (7.05) acknowledges the full-time Lutheran elementary and secondary schools as the best agencies for equipping God's people for ministry; and
>
> WHEREAS, Research (Brekke, *How Different Are People Who Attend Lutheran Schools?)* has presented evidence that the Holy Spirit does work through Lutheran schools, so that they are very effective agencies for the development of spiritual and personal growth; and
>
> WHEREAS, the 1976 Gallup Poll on Education, together with other indicators, provides evidence of a growing concern among parents for the development of the life-styles of their children and youth and a growing interest in the role of moral and spiritual education in that process; and
>
> WHEREAS, the Scriptures have declared parents responsible for their children's education, and parents are granted the freedom to choose the education they desire for their children, a choice which may include the free exercise of religion through the form of a religiously oriented education; and
>
> WHEREAS, Various materials and human resources are available throughout the Synod to aid congregations in the development of early childhood,

> elementary, and junior and senior high school programs of Christian education; therefore be it
>
> *Resolved*, That all congregations, singly or in association with other parishes, be requested seriously to explore the feasibility of initiating or of expanding and strengthening their programs of full-time Lutheran education, not in opposition to public education but as unique alternatives that promote the Christian faith.

The St. Louis [Catholic] Archdiocese Handbook of Policies and Procedures (September 1975) Policy Statement No. 3442 states:

> While respecting individual teachers' freedom under God in valuing a pluralism of lifestyles represented in our school faculties, the Archdiocese reminds all its teachers that they are participating in the educational ministry of the Church. To do this validly, a Catholic School Teacher is called upon to have not only an active faith in God but to give visible witness to it in his manner of living. As the bishops have said in *To Teach as Jesus Did*, "The integration of religious truth and values with the rest of life is brought about in the Catholic school not only by its unique curriculum but, more important, by the presence of teachers who express an integrated approach to learning and living in their private and professional lives."

Rev. John J. Leibrecht, writing in the May, 1966, issue of the *Catholic Educator* stated the importance of the faculty in the Catholic school, as follows:

> Frequently enough when one speaks about distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing called atmosphere. It comes not from the physical facilities, or the religion classes, or the students—at least not chiefly. It comes, for good or for bad, from the faculty. The most distinctive and

valuable thing the Catholic school can offer to parents is its faculty—even more important than the religion classes themselves or the totality of curriculum.

The faculty is a Christian community involved in the experience of together living Christian community life. The student comes to the Catholic school not to be taught *about* Christian living, but to *experience* Christian living. The student is not merely prepared for future Christian living, he gets caught up now in Christian living.

* * *

When the student comes into the Catholic school, he somehow becomes involved in the faculty's own Christian community life, just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible is that spirit created by the common Christian life conscientiously lived by the faculty and participated in by the students. The school is then truly the extension of the parents and their hopes for their children.

Id., at 28, 33.

In this country many denominations spend large portions of their church funds for its educational ministry providing a sectarian education to its young. As this Court noted in *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975), "[t]he very purpose of many [sectarian schools] is to provide an integrated secular and religious education; the teaching process, is, to a large extent, devoted to the inculcation of religious values and beliefs."

If a church-operated school is an integral aspect of the church ministry, it is entitled to the same constitutional protection as other parts of the ecclesiastical program of

the church. In *Lemon* v. *Kurtzman*, 403 U.S., at 616, this Court concluded that the parochial school constitutes "an integral part of the religious mission of the Catholic Church," and stated that "[t]he various characteristics of the school make them a powerful vehicle for transmitting the Catholic faith to the next generation." The *Lemon* Court further noted: "This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in the primary schools particularly. In short, parochial schools involve substantial religious activity and purpose."

The Fourth Circuit Court of Appeals in *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985), recently discussed the application of the Free Exercise Clause to the jurisdiction of equal employment opportunity agencies when they impact on employees of religious organizations involved in the preaching and teaching ministries. The Court there stated:

> "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations. 79 Columbia L.Rev. 1514, 1545 (1979).

Id., at 1169.

The free exercise claim of the Dayton Christian Schools does not depend upon whether the church employees involved are "ordained ministers." As this Court said in *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109, (1943), concerning the sale and distribution of religious literature: "This form of religious activity occupies the same high estate under the First Amendment as does worship

in the churches and preaching in the pulpit." Certainly the educational ministry provided in a pervasively sectarian church-operated school holds equal footing under the Religion Clauses of the First Amendment.

Becuase of the foregoing, the court of appeals was correct in holding that "allowing the OCRC to assert jurisdiction over the instant complaint against DCS when such complaint is based on conduct pursuant to admittedly sincerely held religious beliefs and where the Ohio Civil Rights Act makes no provision for accommodation of those beliefs, unduly burdens the plaintiffs' right to free exercise of religion." *Dayton Christian Schools* v. *Ohio Civil Rights Commission*, 766 F.2d at 955.

CONCLUSION

For the reasons set forth herein, the judgment of the United States Circuit Court of Appeals must be sustained.

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AMICUS CURIAE

BRIEF

NO. 85-488

Supreme Court, U.S.
FILED
FEB 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE CATHOLIC CONFERENCE OF OHIO, AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE*

The Catholic Conference of Ohio ("Conference") is an organization established to serve the Church, state and people of Ohio by assisting in the planning, promotion, conduct and supervision of activities which are under the auspices of the Roman Catholic Church in the areas of education, health, social concerns, law and communications. It coordinates such activities with those of other groups, and represents the point of view of the Church on questions affecting the Church and the public interest. Members of the Conference

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* The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 36.2 of the Rules of this Court.

include clergy and laity representing the Roman Catholic Dioceses of Ohio.

The Conference represents the interests of 1,565 Catholic schools, parishes, and seminaries.

The Conference is entrusted with representing the point of view of the Church on issues that will affect the Church in Ohio. The case at bar involves issues concerning the religious liberty and employment decisions of religious institutions. The Conference does not address the merits of the particular religious beliefs at issue in this case. Nevertheless, because fidelity to religious belief is at the heart of the relationship between a Catholic employer and its employees, the views of the Conference may be relevant to the Court's review of this case.

SUMMARY OF ARGUMENT

This case involves the right of a religious institution which is pursuing a religious mission (1) to employ persons who embrace and give witness to the religious convictions of the institution, and (2) to remove persons from employment, without the threat of civil action, who inhibit the religious mission of the institution. Both courts below have found that Dayton Christian Schools ("DCS") is a pervasively religious institution whose mission is to train children in the nurture and admonition of the Lord, including being "taught Christian doctrine based on the Bible as the textbook authority for such instruction and learning." (J.A. 5). The courts below found that the employment decisions made by Dayton Christian Schools were religiously motivated and were applied to a person who is intimately involved in the pursuit of

the religious mission of Dayton Christian Schools - the teacher.

The State of Ohio has sought to regulate the employment practices of Dayton Christian Schools through the application of the Ohio Civil Rights Act ("Act"). In applying the Act to Dayton Christian Schools, the Ohio Civil Rights Commission ("Commission") would coerce DCS into abandoning a religious practice, i.e., accepting for employment a person who rejects the religious convictions of DCS.

Although racial and sexual discrimination in employment is abhorrent and the elimination of such is a valid goal of the state, in order that the state may carry its burden of proving a compelling state interest, it must show that, as applied to this case, the state's goal cannot be accomplished if the religious practice is accommodated. The state has not carried

this burden.

ARGUMENT

The Free Exercise Clause protects the right of a religious employer to make employment decisions in accordance with religious doctrine free from governmental interference.

The district court and the court of appeals found that Dayton Christian Schools is "a pervasively religious institution in which religious considerations permeate all aspects of the educational process, govern the teacher selection process, and dictate parents' entrustment of their children's education to the school." Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission, 766 F.2d 932, 938 (6th Cir. 1985). Application of the Act implicates two religious beliefs of appellees - the belief that preschool age children need the care and nurture of their mother, and the belief

in an internal grievance procedure for resolving disputes among members of the religious community. Both beliefs were found by the district court and court of appeals to be religious in nature and entitled to constitutional protection. Id. at 938-940.

This case presents a question of religious autonomy and self-governance. It has consistently been held by this Court that religious institutions have "the power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). Church property disputes that involve a determination of ecclesiastical or church governance questions may not be decided by a civil court. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 699 (1976). This Court has applied that

principle "with equal force to church disputes over church polity and church administration." Id. at 710. This Court has thus established the principle that governmental intrusion into the ecclesiastical concerns of a church is prohibited by the Religion Clauses.[1]

Since the Free Exercise Clause protects the right of a religious institution to govern and administer its affairs with regard to faith and doctrine without interference from the state, the state in attempting to apply the Act to Dayton

---

1 The Sixth Circuit notes that there is no need to distinguish between the labels of "church" and "school". The court found that the nature of the institution was "sufficiently spelled out above and in the district court's opinion to allow consideration of the religious interests without reference to whether a church or school, or a teacher or minister is involved." 766 F.2d at 938, n. 10.

Christian Schools intrudes into a religiously-motivated employment decision-making process creating a severe burden upon the Schools' religious freedom.

If the Free Exercise Clause prohibits a court from ordering a church to admit members against the church's wishes, the Free Exercise Clause should also prohibit intervention by a state agency into the religious affairs of an institution which is pervasively religious. Permitting the state to require a religious institution to hire employees or admit members who inhibit the religious mission of the institution and who refuse to give witness to the institution's religious doctrine threatens the autonomy and very nature of the religious institution. The burden would be no different from that imposed by forcing a religious faith community to accept into its membership a person who refuses to

embrace, or to give witness to, the community's religious doctrine. The state is coercing the religious institution to accept secular standards in place of Scripturally-dictated religious standards. 766 F.2d at 950.

The state has urged the Court to adopt a view that the elimination of sex discrimination is much more important than any consequent burden upon this Schools' religious beliefs and uses this Court's decision in Bob Jones University to imply that such burden should be permitted. However, this Court prohibited only the public subsidy of racial discrimination in Bob Jones. It carefully noted that "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their

religious tenets. Bob Jones University v. U.S., 461 U.S. 574, 603-604 (1983). As noted by the court of appeals, the burden of applying the Act to Dayton Christian Schools in this case is much greater than in Bob Jones University. 766 F.2d at 952.

Appellants indicate that the compelling state interest at issue in this case is the eradication of sex discrimination. This Court found in Wisconsin v. Yoder, 406 U.S. 205 (1972), that even though the interest in education of children is a substantial state interest, that state interest must be applied to the specific circumstances of the Amish's free exercise of religion. In Yoder, the Court found that exempting the Amish from the statute in that case would not defeat the state's proper goals in education.

In this case, the Sixth Circuit correctly held that the State of Ohio, by

accommodating the religious beliefs of Dayton Christian Schools would not interfere with the state's fulfillment of its goal of eradicating sex discrimination in employment. 766 F.2d at 955. Appellants indicate that their goal is to assure Mrs. Hoskinson that she will not have "economic and personal decisions thrust upon her because of her sex." Appellants' Brief at 31-32. The state argues that the only way it can accomplish this goal is to "forbid conduct, even though it is based on religious belief, since the prohibition is essential to protect the rights of others." Appellants' Brief at 32. Certainly the state cannot become the teacher of religious doctrine or the arbiter of religious disputes. If the state's position is accepted by this Court, the result will be that the state may force a religious institution to suppress its religious

beliefs concerning the role of women and religious dispute resolution and accept the state as interpreter of religious doctrine. To accommodate Dayton Christian Schools' religious beliefs in this case would not mean that sex discrimination is unimportant, but rather that toleration of various religious beliefs and practices is a paramount interest of government.

The state's attempt to control key aspects of the hiring and disciplinary practices of a religious employer with regard to a religious employee whose employment touches the very heart of the mission of the religious school violates the Free Exercise Clause of the First Amendment.

CONCLUSION

For the reasons stated above, amicus

respectfully urges this Court to affirm the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-488

In the Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
Appellants,

vs.

DAYTON CHRISTIAN SCHOOLS, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE GULF & GREAT PLAINS LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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No. 85-488

In the Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, et al.,
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE GULF & GREAT PLAINS LEGAL FOUNDATION IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

Amicus Gulf & Great Plains Legal Foundation is a not-for-profit public interest law foundation committed to preserving the principles of limited government, free enterprise, federalism, separation of powers, strict construction of the United States Constitution and individual rights. The Foundation, through original litigation and *amicus curiae* briefs, has fervently supported the right of individuals and organizations to freely exercise their sincerely-held religious beliefs as guaranteed under the First Amendment to the United States Constitution and has strenuously opposed state and federal governmental restrictions on and hindrances to the free exercise of religion in this country.

Gulf & Great Plains in the past has filed numerous briefs before this Honorable Court. With the consent of the parties, indicated by letters lodged with the Clerk of this Court, your *Amicus* submits this brief to assist the Court in its deliberations on the significant religious freedom question presented by this appeal.

SUMMARY OF ARGUMENT

The First Amendment Free Exercise Clause limits government and government's authority to regulate and control diverse and sincerely-held sectarian beliefs in the religious educational mission of private sectarian institutions. The conditions set by Dayton Christian Schools in the employment of its school teachers, and at issue in this case, are derived from religious doctrines harbored by the school, its students, administrators, faculty and supporting churches, and cannot be separated from Appellees' free exercise of their religion and the perpetuation of their beliefs through instruction. Ohio's proposed assertion of jurisdiction and control over employment decisions regarding Dayton Christian Schools' religious instructors, through the State's Civil Rights Commission and the application of Ohio's Civil Rights Act, "coercively burdens" Appellees' free exercise of religion without an overriding state interest to do so, in violation of the First Amendment. Application of the Ohio Civil Rights Act to Dayton Christian Schools in the manner sought by the State here must be proscribed.

The First Amendment Establishment Clause was adopted to safeguard against the ascension of a government-sanctioned sect or group of sects as the established faith of government, the establishment of which could result in the persecution and subversion of the rights of conscience of diverse, nonmajoritarian religious sects. Ohio's coercive regulation of Dayton Christian Schools' religious employment standards subverts Appellees' rights of religious conscience and has the effect of gutting Appellees' religious educational mission and supplanting Appellees' fundamentalist sectarian beliefs with majoritarian, mainline religious beliefs. Ohio's proposed action contravenes the Establishment Clause.

The State of Ohio's attempt to regulate alleged religious employment discrimination contradicts the near universal exemption of religious employers from federal and state anti-discrimination measures. This exemption recognizes the truism that the free exercise of religion, and the association of people based on religious beliefs, is inherently discriminating and discriminatory. Validating the State's regulation of Dayton Christian Schools in the manner advanced by the Ohio Civil Rights Commission would render illusory true free exercise of religion by nonmajoritarian sects and would negate the right of individuals and religious organizations to make distinguishing employment choices based on their religious beliefs—choices that may have a direct impact on the propagation of these beliefs.

ARGUMENT

I

THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY PROSCRIBED THE APPLICATION OF THE OHIO CIVIL RIGHTS ACT BY THE OHIO CIVIL RIGHTS COMMISSION TO THE RELIGIOUSLY-BASED EMPLOYMENT DECISIONS OF DAYTON CHRISTIAN SCHOOLS AS AN ABRIDGEMENT OF THE INSTITUTION'S RELIGIOUS LIBERTIES IN VIOLATION OF THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Certain undisputed facts in this case mandate affirmance of the Sixth Circuit Court of Appeals' conclusion that the Ohio Civil Rights Commission's exercise of jurisdiction over the employment termination decisions of a religious educational institution violated the First Amendment rights of the school, its students, administrators, teachers, and supporting parents and churches to freely practice their religious beliefs.

Unquestionably, the church school operation of Dayton Christian Schools (hereinafter "DCS"), and its quintessential religious mission, is a constitutionally protected religious exercise. *Dayton Christian Schools v. Ohio Civil Rights Commission,* 766 F.2d 932, 936-38 (6th Cir. 1985). *See Dayton Christian Schools v. Ohio Civil Rights Commission,* 578 F. Supp. 1004, 1008-09 (S.D. Ohio 1984) ("The exhibits and testimony introduced at the hearing on this matter all support the finding that, from its inception, DCS has had a dominant religious purpose which

permeates both the administrative and substantive aspects of the school.").

More importantly, the conditions imposed by DCS in its employment relationship with Linda Hoskinson and its other female teachers—that mothers of pre-school age children would not be employed as teachers because they should remain home nurturing these children[1] and that teachers were to give a good report and follow the Biblical "Chain of Command" in resolving differences[2]—were premised on the sincerely-held religious beliefs of DCS, its administrators and faculty, and church members from the Patterson Park Church and Christian Tabernacle congregations that supported this Christian school system. 766 F.2d at 936 n.6, 939. The religious doctrines espoused by DCS were made known through its literature and were subscribed to by Mrs. Hoskinson when she accepted the DCS Statement of Faith (J.A. 62) and Educational Philosophy Statement. (J.A. 64-68.) Furthermore, Mrs Hoskinson agreed to the Biblical "Chain of Command" as a term of her employment contract (J.A. 61) and acknowledged in her employment application that "[o]bedience to those in authority over you is clearly stated in the Bible. I believe in God's chain of command." 766 F.2d at 940; 578 F. Supp at 1012.

DCS' adherence to its philosophy in terminating Mrs. Hoskinson constituted religious belief protected by the First Amendment and this question of fact was staunchly affirmed by both lower courts in this case. 766 F.2d at 940 n.15; 578 F. Supp. at 1032.

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1. This condition for the employment of female DCS teachers is premised on Appellees' beliefs that the Scriptures prescribe roles for the female and mother. *See, e.g.,* 1 Peter, Chapter 3; 1 Timothy, Chapter 2; Titus, Chapter 2.

2. *See* Matthew 18:15-17 and Galations 6:1. This condition, of course, applied to both female and male teachers.

A. The Free Exercise Clause Limits The Power Of Government In The Regulation And Control Of The Educational Mission Of Religious Institutions.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Thus reads the first clause of the First Amendment to the Constitution. No civil liberty is more significant to the formation of our constitutional republic than the fundamental right to freely practice one's religious beliefs—and perpetuate these beliefs through instruction—without government interference. This Court expounded on this premise in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), when it observed: "Long before there was general acknowledgement of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs. . . ." *Id.* at 214. The history of the founding of our form of government, and the nascent history of this constitutional safeguard, evidence an overriding commitment to preserve and promote, at all costs, the free exercise of numerous and diverse sectarian beliefs and practices and protect such free exercise from government coercion. *See Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) ("We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."). The First Amendment Religion Clauses were intended, above all, to *limit government;* they were not intended to be used by government to limit the free exercise of religion.

These First Amendment religious safeguards were applied to the States and their legislators in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942) and *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). This Court in *Cantwell* extended the Free Exercise Clause's protection to religious conduct arising out of religious belief and held:

> No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee.
>
> • • •
>
> But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

310 U.S. at 304, 307 (footnote omitted). Government is limited in wielding authority over the exercise of religious beliefs that conflict with the perceived interests of government.

In the appeal *sub judice*, the State of Ohio, through the Ohio Civil Rights Commission (hereinafter "the OCRC" or "the Commission") seeks to assert jurisdiction and control over a church school's religious employment operation under the auspices of its Civil Rights Act, Ohio Revised Code Section 4112.01 *et seq.* The OCRC's proposed Conciliation Agreement and Consent Order, rejected by DCS, would prohibit DCS from seeking information regarding a prospective employee's religious beliefs, and would pro-

hibit DCS from employing church school teachers on the basis of religion without the OCRC's advance certification that religion was a bona fide occupational qualification. (J.A. 97.) Under Ohio's scheme, the State's bureaucracy then would determine whether or not religion, and religious philosophy, should be an appropriate factor for the staffing of Appellees' church school, "a pervasively religious institution in which *religious considerations* permeate all aspects of the educational process, *govern the teacher selection process*, and dictate parents' entrustment of their children's education to the school." *See* 766 F.2d at 938 (emphasis added). *See also* 578 F. Supp. at 1008-09, 1010.

The District Court made the following startling conclusions regarding the effects of an application of the Ohio Civil Rights Act to DCS:

> Applying the above cited statutory prohibitions to DCS, the Court finds that those provisions would appear to make it an unlawful discriminatory employment practice for DCS to make a decision to employ a "Born Again" Christian as opposed to someone, for example, adhering to Catholic or Jewish beliefs, assuming such individuals shared equal teaching abilities. Furthermore, the statute would appear to require DCS to get advance approval from the Commission that religion was a "bona fide occupational qualification" before they could question job applicants about their religious beliefs, keep records concerning applicants' religious beliefs, use forms eliciting information about religious beliefs, advertise for teachers holding particular religious beliefs, adopt a policy of hiring only adherents to fundamentalist principles, or accept applicants through any religiously oriented body that recommended only those holding fundamentalist beliefs.

> A review of the record in this case makes it clear that if these statutory prohibitions were brought to bear on DCS, the School could be found to be violating each and every limitation.

578 F. Supp. at 1020. The District Court later concluded:

> Once again, the Commission could be cast in the role of dictating to the school administration which of its beliefs its members may enforce and, in the alternative, which doctrinal violations they must tolerate and live with.

Id. at 1022.

The Sixth Circuit Court of Appeals correctly held that the State's imposition of these proposed (and other possible) secular guidelines "coercively burdens" the free exercise of Appellee's religious beliefs "and their attempts to instill such in their offspring." 766 F.2d at 952. While government may burden religious practice where a "compelling" or "overriding" state interest may be involved, *see, e.g., United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Bob Jones University v. United States*, 461 U.S. 574, 603 (1983), "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder, supra*, 406 U.S. at 215. The restriction on free exercise may only be invoked to protect against the most "grave and immediate danger" to society, *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639 (1943), and against "actions which [are] in violation of social duties or subversive of good order." *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 164 (1878).

The State of Ohio's interests in eradicating all forms of sex discrimination, or preventing employer retaliation, are insufficient to authorize the "broad and onerous" con-

trols on Appellees' religious free exercise sought here, particularly when balanced against the devastating effect such controls would have on Appellees' religious mission. Precluding the OCRC's exercise of jurisdiction and control over DCS in this instance will simply exempt DCS, and other religious employers within the State, from state employment discrimination laws, a policy position already taken by the federal government and most every state[3] and one consistent with the First Amendment's protection of the free exercise of religion. Employees of private religious institutions will not be protected against employment practices that may involve discriminating[4] choices grounded in religious philosophy. But presumably most all such employees are already well aware of, and subscribe to, the religious philosophies of their employers—as Mrs. Hoskinson was and did in this case! In any event, Mrs. Hoskinson and other female teachers are protected by anti-discrimination laws against the discriminatory practices of all non-religious employers in Ohio. Mrs. Hoskinson and the State of Ohio suffer little burden by accepting the religiously-based employment decisions of DCS.

On the other hand, if the OCRC is permitted to regulate DCS' teachers, the burden on Appellees is nothing less than the total negation of certain sincerely-held religious principles. One must accept that impeding DCS' requirements that teachers accede to the religious and educational doctrines of the school system's administrators

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3. The Sixth Circuit noted that the Ohio Civil Rights Act fails to exempt from anti-discrimination laws religious discrimination by religious institutions as such is exempted by the federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e-1, and most state employment discrimination statutes. *See* 766 F.2d at 941-43 n.18 (and statutory citations therein).

4. *See* Argument I,C, *infra*, regarding the inherently discriminating nature of the free exercise of religion and the association of people based upon religious beliefs.

and congregations directly thwarts the propagation of Appellees' religious beliefs—the very mission of the church school operation. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court upheld the right of parents and private religious institutions to educate their children according to their separate doctrines and beliefs and recognized that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535. This right, and Appellees' religious freedom, cannot be assured where the State of Ohio's burdensome application of its civil rights statute removes from Appellees control over the religious philosophies to be implemented and taught in their church schools.

Appellants' reliance on *Bob Jones University, supra*, to justify its coercive control over DCS' employment practices is misplaced. As the Court of Appeals observed, the governmental interest in *Bob Jones* was far greater than in this case and that precedent should be distinguished from the analysis here. 766 F.2d at 954. The Court in *Bob Jones* focused on racially discriminatory admissions policies for students and the argument was made that a compelling state interest existed to prevent public support (through tax exemption) of discriminatory treatment that "exerts a pervasive influence on the entire educational process." *See Norwood v. Harrison*, 413 U.S. 455, 469 (1973). Here, the issue is the religious administrative guidelines for the employment of church school teachers, not alleged discrimination with regard to the students or the educational process. It is also noteworthy that the federal civil rights laws were cited in *Bob Jones* to herald the "fundamental public policy" violated by the religious institutions' discriminatory admissions policies. *See Bob*

Jones University, 461 U.S. at 594. This same federal civil rights scheme expressly exempts religious employers from the type of charges levied by Mrs. Hoskinson and the OCRC and dramatically illustrates the lack of a fundamental public policy, or compelling state interest, to justify Ohio's burdens on Appellees' religious freedom.[5]

This Court should affirm the Sixth Circuit's decision and provide DCS and the State of Ohio with "advance certification" that the religious philosophy of DCS' teachers is indeed a bona fide occupational qualification for employment in this and all other similar religious institutions.

B. The Establishment Clause Limits The Power of Government To Supplant And Establish Majority-Held Beliefs, Religious Or Political, Over And Above The Sincerely-Held Religious Beliefs Of Diverse Religious Sects As Such Beliefs Affect The Religious Mission Of Those Sects.

The history of the founding of this country, and the formulation of the First Amendment Religion Clauses,

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5. In dictum, the Sixth Circuit suggests the State's denial of tax exemptions *a la Bob Jones University* as a "less burdensome alternativ[e]" to the OCRC's exercise of jurisdiction. 766 F.2d at 955. As set forth above, such still would be violative of Appellees' First Amendment rights since Ohio possesses a lesser governmental interest than did the federal government in *Bob Jones*. More to the point, the power to tax (or exempt from taxation) is the power to destroy. Government decisions to tax, or exempt from taxation, as means of coercing modifications in religious belief violate the very heart of the Free Exercise Clause's protection. *See Thomas v. Review Board of Indiana Employment Security*, 450 U.S. 707, 717-18 (1981). The Court in *Bob Jones* seriously overlooked the religious freedom dangers posed by its precedent. The Sixth Circuit's dictum reflects those dangers. This Court should reexamine the majority analysis in *Bob Jones* and, in any event, should not extend its holding beyond the limited issues in that case.

proffers an Establishment Clause intended not to promote complete government neutrality toward religious exercise and morality, but intended to guard against the ascension of a particular government-sanctioned sect, or group of politically powerful sects, as an established faith of government. *See Wallace v. Jaffree*, 105 S. Ct. 2479, 2508-2520 (1985) (Rehnquist, J., dissenting). *See generally* J. Elliot, *Debates on the Federal Constitution* (1891). Justice Story, in his distinguished treatise on the Constitution, focused on this amendment and concluded:

> The real object of the [First] [A]mendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution . . . and of the subversion of the rights of conscience in matters of religion. . . .

2 Story, *Commentaries on the Constitution of the United States* 631-32 (5th ed. 1891). The Establishment Clause then was intended to promote the free exercise of religion and serve as a buffer in the natural power struggle between the new republic and the churches, a struggle historically dominated by government.[6]

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6. Pastor Richard John Neuhaus, a preeminent scholar on religion and public policy, submits this analysis of the intended relationship of the Religion Clauses as mechanisms for advancing a democratically religious society:

> The "no establishment" clause, it needs ever to be repeated, is in the service of the "free exercise" clause. The primary reason for the "no establishment" clause is not to prevent the church from taking over the state but to prevent the state from taking over the church. The church is the particular society within society that bears institutional witness to the transcendent purpose to which the society is held

(Continued on following page)

While the OCRC's secular guidelines without question constitute an excessive entanglement of church and state in violation of the recent Establishment Clause holdings of this Court, *see Grand Rapids School District of the City of Grand Rapids v. Ball*, 105 S. Ct. 3216, 3222-23 (1985); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), the State of Ohio's intentions, and the prospective scenario of state and federal government regulation and control over the philosophical and belief aspects of private religious education in this country, conjure up images of the very majoritarian oppression feared by Jefferson, Madison and others. Such control over the religious philosophical beliefs of church school staffs 'subverts the rights of conscience in matters of religion.' Such regulation directly challenges DCS' religious mission, and, regardless of any benign or commendable societal or political motive, falls squarely within the Establishment Clause's historical proscriptions.

The coercive nature of the OCRC's proposed regulation of DCS is well documented by the Sixth Circuit in this case. *See* 766 F.2d at 950-52. The State of Ohio, through its Civil Rights Act, seeks to do what other states and the federal government have expressly exempted from the purview of their employment discrimination laws, namely regulate the employment practices of religious institu-

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Footnote continued—

> accountable. Historically, the church has sometimes been an overweening actor within the society, attempting to dominate the whole. Given the maddening diversity of churches that make up the church in America, that has seldom been a problem in American life. *It is the other overweening actor, the state, that has posed the danger of trying to dominate the whole. This is more dangerously the case as people have come to equate the state with society itself.*

R. Neuhaus, *The Naked Public Square* 116 (Eerdmans 1984) (emphasis added).

tions. These exemptions recognize the obvious fact that the diverse free exercise and teaching of sincerely-held religious principles cannot occur if government maintains the power to impose the will of the majority on religious employers or institutions through civil rights laws where these religious principles or beliefs conflict with mainline precepts of right and wrong.

If Ohio is allowed to regulate DCS through conciliation agreements and consent orders, then this Court and the American people can expect to see the repeal of these statutory exemptions by majoritarian political forces, and, ultimately, the subtle exercise of government authority over politically unpopular religious practices. This gradual intrusion will inhibit the diversity of religious sects and practices in this country, resulting in the *de facto* establishment of politically acceptable, mainstream religious beliefs, perhaps someday the American Church of the Middle Ground. This is exactly what Madison feared when he proclaimed on the floor of the House of Representatives that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 Annals of Cong. 730.

C. Empowering Government With The Authority To Regulate Religious Belief And Education In The Manner Sought Here By The State Of Ohio Contravenes The Intent Of The Framers Of The First Amendment And Establishes A Precedent Imperiling The Free Exercise Of Diverse And Nonmajoritarian Religious Beliefs.

A decision by this Court to validate the OCRC's regulation of DCS, and any order resulting in the nullification

of any of DCS' religious employment practices, would open the door for state and federal governments, through their politicians, bureaucrats, and politically influential special interest groups, to supplant the perhaps unique or unpopular religious beliefs of private religious groups with the majority's paternalistic notion of "proper" beliefs. One would be hard pressed to find a more vicious and blatant abridgment of the free exercise of religious liberties contemplated by the drafters of our Constitution.

The critical free exercise of religion, and the concomitant association of people by religious belief, is inherently discriminating and discriminatory; but such should not, and cannot, be held to constitute "unlawful discrimination" under state or federal civil rights laws or else true free exercise of religion under the First Amendment would become illusory. This truth is codified in the exemptions to the federal and state employment discrimination laws discussed above. If a Baptist is denied membership in an influential Jewish organization because she refuses to convert and renounce her strongly-held Baptist (and Christian) beliefs, has a discriminatory choice been made? Yes. Are her constitutional rights violated? Of course not. If the OCRC can regulate DCS' recruitment and selection of religious teachers pursuant to its Civil Rights Act, may it also order the ordination of women priests in Ohio —even if this directly interferes with the propagation of the Catholic religious and educational mission and that faith's tenets?

Assume *arguendo* that Mrs. Hoskinson's right to employment with DCS after the birth of her child, and her right to pursue an EEO claim despite her contractual promise to follow the Biblical Chain of Command, ascend to

the level of constitutional equal protection rights under the circumstances of this case. The superseding of these rights above the rights of DCS, its students, administrators, teachers, parents, and supporting churches to freely practice their religious beliefs—and educate privately based upon these beliefs, and make discriminating, i.e., distinguishing, religious employment decisions based upon these beliefs—would effectively negate Appellees' free exercise of religion. And a decision in this case negating DCS' religious liberties would signal to the populace that the free exercise of diverse religious beliefs is no longer safeguarded by the clear mandate of the Religion Clauses of the First Amendment, but is subject to the laws and regulations of the majority's legislatures and bureaucrats, which in turn are influenced overwhelmingly by compromised, mainline religious beliefs.

Appellees have the right to believe in and exercise their religious philosophy. Appellees have the right to teach that philosophy to their children in a private environment conducive to their beliefs and without coerced capitulation to faculty members or government agencies that may disagree with or flout the basic tenets of their faith.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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BRIEF

Supreme Court, U.S.
FILED
FEB 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND WOMEN FOR FAITH AND FAMILY, AMICI CURIAE, IN SUPPORT OF APPELLEES

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BRIEF FOR THE CATHOLIC LEAGUE FOR RRELIGIOUS AND CIVIL RIGHTS AND WOMEN FOR FAITH AND FAMILY, AMICI CURIAE, IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a civil rights organization, national in membership, organized to combat all forms of religious prejudice and discrimination and dedicated to the defense of parent's rights to educate their children in accordance with their religious beliefs. The League's interest in this matter stems from its desire to ensure that all religiously motivated parents are permitted to freely exercise their parental and religious rights to educate their children in sectarian schools free from the threats of either state interference with these rights or excessive state entanglement in religious matters. The League frequently files amicus curiae briefs in cases,

such as this one, in which important religious freedom rights are in controversy.

Women for Faith and Family is a group of Roman Catholic women who have signed affirmations indicating their fidelity to Catholic teachings on matters of faith and family. While perhaps differing from Dayton Christian Schools on certain involved matters of religious doctrine and practice, Women for Faith and Family is interested in this case because of its belief that personal preferences of any person, male or female, should not be allowed to seriously undermine the ability of a sectarian school to carry out its mission to teach matters of religious faith.

The amici have obtained written permission to file this brief from the counsels of record for the parties in this case. These letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This matter raises issues touching upon constitutionally recognized parental and religious rights to educate children in accordance with parental beliefs, to direct children's education and to associate to advance religious positions. The important role sectarian schoolteachers play in the exercise of these rights requires that Christian schoolteachers have employment responsibilities and employment relationships which are pervasively religious. This, in turn, means that state regulation of the employment of these teachers will often result in excessive state entanglement with religion or interference with constitutionally recognized parental and religious rights.

The employment responsibilities and employment relationships of sectarian schoolteachers are pervasively religious. This fact has been noted in previous decisions of this Court. For example, this Court has "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school," *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979). This Court's previous observations concerning the pervasively sectarian nature of Christian schoolteacher's employment responsibilities and employment relationships have often occurred in cases which have involved Roman Catholic schools. The teachings of the Catholic church confirm this Court's observations. These teachings note that the Church requires sectarian schoolteachers to play a critical role in the religious formation of their pupils. The record before this Court further reveals that Dayton Christian Schools' teachers have the same type of pervasively sectarian responsibilities and employment relationships as their Catholic counterparts.

The pervasively Christian nature of employment responsibilities and relationships of teachers at Dayton Christian Schools means that application of state sex discrimination laws in this case will excessively entangle the state in religious matters and interfere with constitutionally recognized parental and religious rights. The State's attempt to utilize its expansive interpretation of its sex discrimination laws to restructure the employment relationship between Dayton Christian Schools and its teachers is an example of excessive state entanglement with religion. Both the conclusions the state agency reaches and the process by which these conclusions are reached could have excessively entangling effects upon religion. The excessive entanglement accompanying the mere process of investigation is underscored by this Court's discussion of the entangling effect of "simple administrative cooperation" in *Aguilar v. Felton*, 105 S.Ct. 3232, 3239 (1985). If the minor, almost casual contacts in that case can give rise to excessive entanglement, it is clear that the extensive array of friendly and coercive contacts in this case would also give rise to such entanglement.

The entanglement involved in this case could also raise problems for Catholic schools and parents of children in Catholic schools. For example, the State's extension of sex discrimination protection to all consequences of pregnancy could mean that Catholic schools would be forbidden from considering a teacher's abortion in an employment decision. Catholic schools could, then, be required to hire and retain persons in pervasively religious teaching positions who are subject to excommunication by the Catholic Church. Further, under the facts of this case, the Catholic school could not consider its religious teachings concerning a mother's responsibilities for caring for young children in giving even

beneficial treatment to its female employees who have such responsibilities.

Application of the state sex discrimination law in this case would also interfere with constitutionally recognized parental and religious rights in children's education. Interference with the pervasively religious employment relationships and employment responsibilities of sectarian schoolteachers will impinge upon parents' rights to inculcate religious values and standards through teachers whose entire behavior conforms to their desired ideal. This interference would be greater than that allowed in such previous cases as *Bob Jones University v. United States*, 461 U.S. 574, 603-604 (1983), which have not prevented parents and schools from actually observing their religious tenets. This interference is also not supported by *Roberts v. United States Jaycees*, 104 S.Ct. 3244, 3254 (1984), which involved a significantly lesser private interest and stronger state interest than that found in the instant case. Accordingly, application of the sex discrimination law in this matter will interfere with constitutionally recognized parental and religious rights as well as excessively entangle the state in religious matters.

ARGUMENT

I.

CONSTITUTIONALLY RECOGNIZED PARENTAL AND RELIGIOUS RIGHTS UNDERLIE THIS MATTER.

In approaching this case it is important for this Court to be aware of the constitutionally recognized parental and religious rights underlying this matter. Dayton Christian Schools, like all Christian schools, owes its existence to parent's exercise of their constitutionally guaranteed rights to educate their children in accordance with their religious beliefs,[1] to direct their children's education,[2] and to associate

[1] *See Wisconsin v. Yoder*, 406 U.S. 205, 213-214 (1972).

[2] *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 213-214 (1972), *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

to advance their religious positions.[3] When parents delegate a portion of these God-given, constitutionally recognized rights and responsibilities to schools, the teachers associated with the schools become the critical agents for the effective exercise of these parental rights and responsibilities. As will be seen, this fact requires that the employment responsibilities and employment relationship of a Christian schoolteacher differ markedly from those of a teacher in a secular school. As will also be seen, these differences in the Christian schoolteacher's employment responsibilities and employment relationship require a freedom from excessive state entanglement with religion and from state interference with parental and religious rights which would not be necessary in the case of a secular teacher.

II.

THE CHRISTIAN SCHOOLTEACHER'S EMPLOYMENT RESPONSIBILITIES AND EMPLOYMENT RELATIONSHIP ARE PERVASIVELY SECTARIAN RESULTS OF THE EXERCISE OF CONSTITUTIONALLY RECOGNIZED PARENTAL AND RELIGIOUS RIGHTS.

When religiously oriented parents determine that a Christian school will help carry out their constitutionally recognized parental and religious rights to educate their children, they trust the school with the awesome responsibility of molding their children's lives. The sectarian schoolteacher assumes the most immediate, and perhaps most important, role in handling this responsibility. Obviously this means that the teacher's employment responsibilities and employment relationship with the sectarian school will have intense religious content. This fact is borne out in this Court's past consideration of the employment responsibilities and employment relationships of teachers in private sectarian schools, largely of the Roman Catholic tradition, in the teachings of the Catholic Church and in the employment responsibilities and employment relationships of Dayton Christian Schools' teachers.

[3] *Compare, Runyon v. McCrary*, 422 U.S. 160, 175-176 (1976).

The most significant observations concerning the pervasively sectarian character of the sectarian schoolteacher's job responsibilities and employment relationship can be found in past decisions of this Court. In several cases in which Christian schools might have preferred judgments that the Christian schoolteacher's job responsibilities and employment relationships were not pervasively sectarian,[4] this Court has noted the pervasively sectarian character of these responsibilities and relationships.

In *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971), this Court observed that: "[r]eligious authority necessarily pervades the [sectarian] school system." The *Lemon* Court then cited a handbook of "School Regulations" which emphasized the important role of the parochial schoolteacher: " 'The prime factor for the success or the failure of the school is the spirit and personality, as well as the professional competency, of the teacher. . . .' " *Id.* at 618. The Court also noted the intensely religious nature of the sectarian teacher's treatment of even secular subjects: "[A] dedicated religious person, teaching in a school affiliated with his or her faith and operating to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines of faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion." *Id.* at 618-619.

The *Lemon* Court's recognition of the pervasively sectarian nature of the Christian schoolteacher's employment responsibilities and employment relationship was amplified in *Meek v. Pittenger*, 421 U.S. 349, 370-71 (1975). Again rejecting the notion that a simple division could be made between sectarian and non-sectarian educational duties the Court noted: "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become

[4] *See e.g., Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

intertwined with secular instruction persists. The likelihood of inadvertant fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished possibility of impermissible conduct is not sufficient: 'The state must be certain, given the Religion Clause, that subsidized teachers do not inculcate religion.' And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities." 421 U.S. at 370-71 (citations omitted). Equating the job responsibilities of sectarian school guidance counselors with sectarian schoolteachers, the Court concluded that the nature of a sectarian schoolteacher's or counselor's job responsibilities gave rise to religion clause problems even in a case in which these employees were not directly subjected to religious authority. *See* 421 U.S. at 371-72.

This Court's opinions concerning the pervasively sectarian nature of the religious schoolteacher's employment responsibilities and employment relationship were most directly summarized in *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-502 (1979). Citing *Lemon* and *Meek* this Court noted the excessive state entanglement in religion likely to result from regulation of the sectarian school-teacher employment relationship under the National Labor Relations Act:

> In recent decisions involving aid to parochial schools we have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school. What was said of the schools in *Lemon v. Kurtzman*, is true of the schools in this case: "Religious authority necessarily pervades the school system." The key role played by teachers in such a school system has been the predicate for our conclusions that government aid channelled through teachers creates impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools.
>
> . . . Good intentions by government—or third parties—can surely no more avoid entanglement with the reli-

gious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon*, *Meek*, and *Wolman*.[8]

In the cases which have determined that Christian schoolteacher's employment responsibilities and employment relationships are pervasively sectarian, this Court has primarily concentrated upon a study of Catholic schools. It is no accident that this Court would have observed that these Catholic schoolteachers' employment responsibilities and relationships are pervasively sectarian. The Catholic Church's teaching seeks precisely this end. The Church begins with the proposition that parents are the primary edu-

[8] 440 U.S. at 501-502 (citation omitted). The Court has not retreated from the position that a Christian schoolteacher's employment responsibilities and employment relationship are pervasively sectarian. In a very recent case, *Aguilar v. Felton*, 105 S.Ct. 3232, [illegible] (1985), this Court observed that:

> [M]any of the schools involved in this case are the same sectarian schools which had " 'as a substantial purpose the inculcation of religious values' " in *Committee for Public Education v. Nyquist*. . . Moreover, our holding in *Meek* invalidating instructional services much like those at issue in this case rested on the ground that the publicly funded teachers were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Meek*. The court below found that the schools involved in this case were "well within this characterization." Unlike the schools in *Roemer*, many of the schools here receive funds and report back to their affiliated church, require attendance at church religious exercises, begin the school day or class period with prayer, and grant preference in admission to members of the sponsoring denominations. In addition, the Catholic schools at issue here, which constitute the vast majority of the aided schools, are under the general supervision and control of the local parish.
>
> The critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case.

105 S.Ct. at 3238 (citations omitted).

cators of their children. Second Vatican Ecumenical Council, Declaration on Christian Education, *Gravissimum Educationis* (1965), at no. 3. As Pope John Paul II explained, this primary parental role can never be completely abandoned:

> The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is *original* and *primary* with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is *irreplaceable* and *inalienable*, and therefore incapable of being entirely delegated to others or usurped by others.

Pope John Paul II, Apostolic Exhortation, The Role of the Christian Family in the Modern World, *Familiaris Consortio* (1981), at no. 36 (emphasis in original).

As the instrument for the implementation of Catholic parents' God-given educational rights and responsibilities, Catholic schools must have a distinctly and pervasively Christian orientation. The Sacred Congregation for Catholic Education, in its document, *The Catholic School* (1977), at no. 33, makes clear that the distinctive feature of a Catholic school is "its reference to a Christian concept of life centered on Jesus Christ." "Christ is the foundation of the whole educational enterprise in a Catholic school," *id.* at no. 34, and "[t]he Catholic school is committed. . . to the development of the whole man, since in Christ, the perfect Man, all human values find their fulfillment and unity." *Id.* at no. 35. The goal at which the Catholic school aims is "forming in the Christian those particular virtues which will enable him to live a new life in Christ and help him to play faithfully his part in building up the Kingdom of God." *Id.* at no. 36 (citation omitted). Based on these premises the Catholic school has the tasks of synthesizing "culture and faith" and "faith and life." *Id.* at no. 37. "The first [of these two syntheses] is reached by integrating all the different aspects of human knowledge through the subjects taught, in the light of the Gospel; the second in the growth of the virtues characteristic of a Christian." *Id.* A more pervasively Christian

educational enterprise could scarcely be imagined.

A teacher in a Catholic school has an absolutely critical role in the achievement of the purpose motivating both the school and the students' parents: educating students for Christian life. The Sacred Congregation for Catholic Education noted the immense opportunity available to the Christian teacher:

> Since the educative mission of the Catholic school is so wide, the teacher is in an excellent position to guide the pupil to a deepening of his faith and to enrich and enlighten his human knowledge with the data of the faith. While there are many occasions in teaching when pupils can be stimulated by insights of faith, a Christian education acknowledges the valid contribution which can be made by academic subjects for the development of a mature Christian. The teacher can form the mind and heart of his pupils and guide them to develop a total commitment to Christ, with their whole personality enriched by human culture.

Sacred Congregation for Catholic Education, *The Catholic School* (1977), at no. 40. The Sacred Congregation amplified upon this opportunity for the Christian teacher in the following fashion:

> The school considers human knowledge as a truth to be discovered. In the measure in which subjects are taught by someone who knowingly and without restraint seeks the truth, they are to that extent Christian. Discovery and awareness of truth leads man to the discovery of Truth itself. A teacher who is full of Christian wisdom, well prepared in his own subject, does more than convey the sense of what he is teaching to his pupils. Over and above what he says he guides his pupils beyond his mere words to the heart of total Truth.
>
> The cultural heritage of mankind includes other values apart from the specific ambient of truth. When the Christian teacher helps a pupil to grasp, appreciate and assimilate these values, he is guiding him towards eternal realities. This movement towards the Uncreated Source of all knowledge highlights the importance of teaching for the growth of faith.

Id. at nos. 41, 42. The Sacred Congregation went on to stress that it is the teacher, rather than simply the subject matter or methodology, which makes Christian education successful:

> This achievement of this specific aim of the Catholic school depends not so much on subject matter or methodology as on the people who work there. The extent to which the Christian message is transmitted through education depends to a very great extent on the teachers. The integration of culture and faith is mediated by the other integration of faith and life in the person of the teacher. The nobility of the task to which teachers are called demands that, in imitation of Christ, the only Teacher, they reveal the Christian message not only by word but also by every gesture of behavior. That is what makes the difference between a school whose education is permeated by the Christian spirit and one in which religion is only regarded as an academic subject like any other.

Id. at no. 43. The Sacred Congregation then observed that the teacher's purpose is to ensure that the pupil's entire life reflects Christian purposes:

> The fundamental aim of teaching is the assimilation of objective values, and, when this is undertaken for an apostolic purpose, it does not stop at an integration of faith and culture but leads the pupil on to a personal integration of faith and life.
>
> . . . The Catholic school should teach its pupils to discern in the voice of the universe the Creator Whom it reveals and, in the conquest of science, to know God and man better. In the daily life of the school, the pupil should learn that he is called to be a living witness to God's love for men by the way he acts, and that he is part of the salvation history which has Christ, the Savior of the world, as its goal.

Id. nos. 44, 46.

The absolutely critical role of the unabashedly Christian teacher in the Catholic school obviously results in employment responsibilities and an employment relationship which are pervasively religious. The teacher's job responsibilities and employment relationship cannot be conveniently segmented into sectarian and secular components. Instead, the teacher's employment responsibilities and employment relationship are pervasively sectarian throughout. Similarly, the teacher's total life, rather than simply his or her behavior on the job, becomes crucial to teaching success. The teacher's life must be unquestionably Christian in order for the Christian message to be imparted to the teacher's pupils.

Dayton Christian Schools' teachers also have employment responsibilities and employment relationships which are pervasively Christian in character. An examination of the exhibits submitted in this matter graphically illustrates this point. Dayton Christian Schools have very clearly Christian purposes. *See* App. at 1-2, 5, 7-8, 17, 28, 31, 35, 64-68. Dayton Christian Schools, like Catholic schools, educate Christian youths in a fashion which does not segment secular and religious pursuits and which will lead these youths to a fully developed Christian faith. Dayton Christian Schools' Teacher's Manual and the attachments to Mrs. Hoskinson's Dayton Christian Schools Teacher's Contract note:

> The entire process of education is seen as a means used by the Holy Spirit to bring the student into fellowship with God, to help him become strong or mighty in the Spirit, to assist him in developing a Christian mind, to enable him to think God's thoughts, to train him in Christ-likeness, to teach him to act like God and to help the student demonstrate Christ-like character qualities so that he can fulfill God's total purpose for his life personally and vocationally. He is taught the Bible so he may understand God as well as his own true nature and function as God's image. He is developed and related to God as a whole person, that is: spiritually, mentally, physically and socially. He is taught to see all truth as God's truth and to integrate it with, and interpret it by,

> God's Word. He is educated as an individual with his own unique abilities and personality who learns to live and work with others at home, in the church and in a changing secular society. He interacts with and is taught by parent and teacher models who are themselves born again and have this perspective on life.
>
> The authority for such an education comes both from God's command that children be taught to love God and place Him first in their lives and from the fact that parents are responsible for the total education and training of their children. At the parents' request, the Christian school, along with the church, becomes a partner in giving this education.

App. at 31-32, 64-65. As in the Catholic school, the Dayton Christian Schools teacher plays the critical role in achieving the purpose of molding the Christian pupil. The first paragraph of the teacher's contract recognizes this responsibility:

> Your duties will involve not only the responsibilities ordinarily incumbent; but also those responsibilities related to the special spiritual ministry to which you are called—the training of the child in Christian faith and practices. In a very real sense, therefore, it is the expectation of this Board that you will strive at all times to understand, appreciate, and love the pupils entrusted to you for instruction, and that you will, to the best of your ability, provide for their fullest intellectual, physical, emotional, and spiritual development.

App. at 59. Further, as in the Catholic school, the Dayton Christian Schools teacher is expected to realistically integrate Christian beliefs into the subject matter taught:

> METHOD: Teachers must be alert in preparation and teaching to think through their lessons carefully as to the Christian approach and God's relation to the subject at hand, and present their findings to the students. In seeking to do this the teacher should not be preachy or stretch the imagination in order to find some correlation.

> In presenting any lesson, the Christian teacher should be aware that he is dealing with God's truth, for all truth is His. Throughout the year, the student should become convinced of this fact both by the teaching and by the attitude of the teacher. Further correlation can be found between the particulars of each subject and the Bible. These should be explored and explained to the students. We must beware of trying to find a Scripture verse of illustration for everything we teach. This is neither possible, nor necessary. We must remember, however, that since God is revealed in all His creation (Psalm 19:1), His wisdom and handiwork are seen in all subjects. The teacher's task is to bring the student face to face with God at every turn of study.

App. at 36. Dayton Christian Schools realize that this integration will only result when a teacher has truly integrated God's Word into his or her life:

> THE TEACHER'S PLACE: True integration of subject matter hinges on the *teacher's personal devotional study of the Bible.* As we live in the Word of God and in our subject fields, we will find much common ground and God's truth will become integrated in our thinking. As *our lives and thoughts* thus become integrated spiritually, we will be able to naturally, without straining, convey this to the students. Integration must not be forced.

App. at 36 (emphasis in original). To insure this integration of faith in the teacher's life, the teacher is also required to sign a Statement of Faith. App. at 62-63. Obviously, Dayton Christian Schools teachers, like Catholic schoolteachers, have employment responsibilities and employment relationships which are pervasively sectarian. These responsibilities and relationships cannot be separated into secular and religious components, and demand that every phase of the teacher's life be led in a Christian fashion. As in the Catholic school, state regulation of such pervasively religious matters raises real questions of excessive state entanglement with religion and interference with constitutionally recognized parental and religious rights to direct children's education. We now move to these problems.

III.

APPLICATION OF STATE SEX DISCRIMINATION LAWS TO DAYTON CHRISTIAN SCHOOLS RESULTS IN EXCESSIVE STATE ENTANGLEMENT IN RELIGION AND INTERFERENCE WITH CONSTITUTIONALLY PROTECTED RELIGIOUS AND PARENTAL RIGHTS WHICH WILL HAVE POTENTIALLY FAR-REACHING EFFECTS ON MANY RELIGIOUS PARENTS AND INSTITUTIONS, INCLUDING CATHOLIC PARENTS AND INSTITUTIONS.

A. Application of the State Sex Discrimination Laws to Dayton Christian Schools Results in Excessive State Entanglement in Religion with Potentially Far-Reaching Effects on Catholic Parents and Institutions.

The prohibition of excessive state entanglement in religion, like other parts of the Religion Clause, " 'rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.' " *Aguilar v. Felton,* 105 S.Ct. 3232, 3237 (1985) (quoting *McCollum v. Board of Education,* 333 U.S. 203, 212 (1948)). To carry out this premise this Court has also recognized: "That underlying the Establishment Clause is 'the objective. . . to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other.' " *Aguilar,* 105 S.Ct. at 3239 (quoting *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971) (brackets in original)). This Court has isolated two concerns underlying the need to prevent excessive state entanglement in religious affairs:

> When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.

Aguilar, 105 S.Ct. at 3237. Although many cases have dealt with situations in which the directly affected church wel-

comed the excessively entangling state involvement,[6] excessive entanglement is even more of a concern when government intervention is not wanted by the affected religious organization. In such an instance those inside the directly affected religious organization clearly join those outside the organization in having their religious freedoms limited by the state's actions.

In this case there are several factors which would indicate a strong basis for a finding of excessive governmental entanglement in religion. As demonstrated above, the state is interfering with a pervasively sectarian set of employment responsibilities and employment relationships. As was also demonstrated, these employment responsibilities and relationships cannot readily be divided into secular and religious components. Many aspects of these responsibilities and relationships which would be secular in a public school are pervasively sectarian at Dayton Christian Schools. Further, as will be demonstrated later, excessively entangling regulation of the employment responsibilities and employment relationships involved here could have devastating effects upon the employment responsibilities and employment relationships of persons in other pervasively sectarian institutions, such as Catholic schools. Thus, this Court's observations about sectarian schoolteachers' employment responsibilities and employment relationships in *NLRB v. Catholic Bishop*, 440 U.S. 490, 504 (1979), are very pertinent to this matter: "The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other non-religious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions. . . ."

The State's attempt to utilize its expansive interpretation of its sex discrimination laws to restructure the employment relationship between Dayton Christian School and its teachers represents exactly the type of state entanglement

[6] *See e.g., Aguilar v. Felton*, 105 S.Ct. 3232 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

in religious affairs which this Court was concerned with in *Catholic Bishop*. The State's description of its investigation and adjudication of sex discimination matters as an application of "neutral principles"[7] is really nothing more than an attempt to reword the NLRB's contention in *Catholic Bishop* that the Board would only resolve "factual issues." *See* 440 U.S. at 502. Whether the proposed governmental investigation is cast in terms of an "inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's mission," *Catholic Bishop*, 440 U.S. at 502, or an application "of neutral evidentiary principles to determine whether that [legitimate, non-discriminatory religious] reason was the real reason for the decision or whether the action in fact was motivated by the employee's sex," Brief for Appellants at 35, the inquiry will necessarily probe the pervasively religious issue of the genuineness of proffered religious reasons for an employment decision. As in *Catholic Bishop*, 440 U.S. at 502 n.10, both the conclusions the agency reaches and the process by which these conclusions are reached could have excessively entangling effects upon religion.

The problems accompanying the mere process of state examination of the pervasively sectarian employment relationship between Dayton Christian Schools and its teachers are underscored by a consideration of this Court's discussion of the entangling effects of mere "administrative cooperation" in *Aguilar v. Felton*, 105 S.Ct. 3232, 3239 (1985). In that case simple, almost casual, cooperative contacts between public officials and religious school administrators and teachers, which involved the discussion of details relating to a cooperative school program, were apparently considered to be excessively entangling. *See id.* However, the scope of the administrative cooperation in *Aguilar* is minor compared to that found in the administrative processes involved in this case. Here the State would be engaging in comprehensive ongoing mediation and investigation of the merits of a discrimination charge. This preliminary stage of the process would involve the potential for repeated contacts between

[7] *See* Brief for Appellants, at 34-36.

state officials and religious school personnel. Indeed, evidence of such an intrusive mediation and investigation process is already present in this case. *See* App. at 78-91. Following this set of entangling administrative contacts, a process of conciliation would take place which would feature another set of cooperative contacts. *See* App. at 92-93. Interestingly, in this case, this process has already included conciliation proposals which called for ongoing state supervision of the employment relationships between Dayton Christian School and a teacher, Conciliation Agreement and Consent Order, ¶ II-E, App. at 97, and state required establishment of guidelines for employee pregnancy and child care which would apparently be applicable to all the school's teachers. Conciliation Agreement and Consent Order, ¶ II-J, App. at 97. After all these processes have been finished, the School could then become subject to a coercive hearing process. *See*, App. at 99-102. After such a hearing it would likely be possible for the State to order the type of ongoing supervision proposed in the conciliation agreement. Since occasional, basically casual contacts constituted excessively entangling administrative cooperation in *Aguilar*, it is clear that the array of cooperative and coercive contacts resulting from application of the state anti-discrimination statute to Dayton Christian Schools is a form of excessively entangling administrative cooperation.[8]

The excessive entanglement in religion arising from the use of state sex discrimination laws to interfere with decisions covering pregnancy related matters in the pervasively sectarian Christian school-teacher employment relationship will have a decided effect upon parents and religious institutions far beyond the confines of Dayton Christian Schools. An obvious victim of this case would be Catholic schools and parents of Catholic schoolchildren who would be

[8] The comprehensive and continuing nature of the governmental contacts and administrative cooperation resulting from the mediation, investigation conciliation and hearing phases of the Ohio sex discrimination statute distinguishes this matter from cases in which simple one-time adjudications of the meaning of documents prepared by a religious body has been permitted. *Compare, Jones v. Wolf*, 443 U.S. 595 (1979).

confronted with a potential threat to their religious and educational freedoms. If sex discrimination laws are read to protect all matters related to pregnancy, as Ohio appears likely to determine, it would seem inevitable that these laws would also prohibit a Catholic institution from considering an employee's decision to undergo an abortion in its employment decisions. The State's Brief, for example, cites the policies underlying this Court's recognition of legalized abortion in *Roe v. Wade*, 410 U.S. 113 (1973) as justifying its broad construction and application of its sex discrimination laws. *See* Brief for Appellants at 25-26. Yet, the Catholic Church will often excommunicate those who have an abortion. *See Code of Canon Law*, Canon 1398 (1983). In light of the penalty of excommunication which can be incurred when a Catholic undergoes an abortion, it would also seem likely that a school controlled by the Catholic Church would choose to terminate an individual engaging in such an action from the sensitively religious position of Catholic schoolteacher. It is difficult to imagine a more excessively entangling exercise of state jurisdiction than a state sex discrimination investigation, hearing and decision involving such a religiously based employment determination.

Even the facts of this case could cause problems for a Catholic school. The State apparently takes the position that any consideration of a woman's special role in childrearing in an employment decision constitutes sex discrimination.[9] While a Catholic school might not have reacted in precisely the same way as Dayton Christian Schools, Catholic religious teaching emphasizes the necessity for economic relationships and governmental programs to be constructed in ways which make outside employment unnecessary for mothers with young children. In his Encyclical, *On Human Work (Laborem Exercens) (1981)*, Pope John Paul II wrote:

> Experience confirms that there must be a social re-evaluation of the mother's role, of the toil connected with it and of the need that children have for care, love and

[9] *See* Brief for Appellants at 24-26.

affection in order that they may develop into responsible, morally and religiously mature and psychologically stable persons. It will redound to the credit of society to make it possible for a mother—without inhibiting her freedom, without psychological or practical discrimination, and without penalizing her as compared with other women—to devote herself to taking care of her children and educating them in accordance with their needs, which vary with age. Having to abandon these tasks in order to take up paid work outside the home is wrong from the point of view of the good of society and of the family when it contradicts or hinders these primary goals of the mission of a mother.

In this context it should be emphasized that on a more general level the whole labor process must be organized and adapted in such a way as to respect the requirements of the person and his or her forms of life, above all life in the home, taking into account the individual's age and sex. It is a fact that in many societies women work in nearly every sector of life. But it is fitting that they should be able to fulfill their tasks in accordance with their own nature, without being discriminated against and without being excluded from jobs for which they are capable, but also without lack of respect for their family aspirations and for their specific role in contributing, together with men, to the good of society. The true advancement of women requires that labor should be structured in such a way that women do not have to pay for their advancement by abandoning what is specific to them and at the expense of the family, in which women as mothers have an irreplaceable role.

(citation omitted). A Catholic school, like Dayton Christian Schools, would be unable to follow the dictates of its religious teaching in this area. Instead of prayerfully considering religiously based concerns about a mother's special responsibilities in childrearing, the Catholic school would be deprived of the opportunity to make any decision providing special consideration, even of a beneficial nature, of a woman's traditional familial responsibilities.[19] Any such consideration could subject the Catholic school to a lengthy investigative and adjudicatory process where its religiously based decision would be subject to review by state enforcement bodies. Such interference with the very heart of a pervasively sectarian employment relationship is a clear example of excessive state entanglement with religion.

In short, the effects of enforcement of the sex discrimination statute against a pervasively Christian school, together with the extensive administrative cooperation necessary for the achievement of this enforcement, excessively entangle the state in religious affairs. The excessive entanglement resulting from application of the sex discrimination laws to a pervasively religious employment relationship will affect, in a potentially devastating fashion, freedoms of all religious groups, including Roman Catholics.

B. Application of the State Sex Discrimination Law to Dayton Christian Schools Results in Interference with Rights of Free Exercise of Religion, Direction of Children's Education and Association with Potential Far-Reaching Effects on Catholic Parents and Institutions.

The same factors which compel a conclusion that application of the state sex discrimination statute to Dayton Christian Schools constitutes excessive entanglement with religion also require a determination that application of the statute to Dayton Christian Schools would impair constitutionally protected rights of free exercise of religion, direction of children's education and association to advance religious purposes. Free exercise of religion is clearly impaired by application of a sex discrimination statute to directly reverse a religiously grounded employment decision. Similarly, parental rights to direct children's education and to associate for religious purposes are infringed by such an action. State interference with a sectarian schoolteacher's pervasive-

[19] For example, a strong argument could be made that such consideration could give rise to a "reverse discrimination" suit by males who were not given this consideration.

ly religious employment responsibilities and employment relationship has the potential to impair parents' right to inculcate their religious values and standards through teachers whose entire behavior conforms to their desired ideal. *Compare, Runyon v. McCrary*, 427 U.S. 160, 177 (1976), *Norwood v. Harrison*, 413 U.S. 453, 462 (1973) (state may regulate schools if there is no impairment of right to inculcate religious values).

The interference with free exercise of religion, direction of education, and association for advancement of religious purposes resulting from application of the sex discrimination to Dayton Christian Schools would be far greater than the interference permitted in any previous case. In *Bob Jones University v. United States*, 461 U.S. 574, 603-604 (1983), it was held that denial of a tax benefit on account of a regulation prohibiting interracial dating did not impair free exercise of religion. This Court recognized that: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent these schools from observing their religious tenets." *Id.* at 603-604. In this case, by contrast, application of the sex discrimination statute will prohibit Dayton Christian Schools from observing the schools' religious tenets.[10]

The State's primary defense to this obvious impairment of constitutionally recognized religious, parental and associational rights is that any interference with these rights is justified by an allegedly compelling interest in preventing sex discrimination. The State feels this interest should override any asserted religious, parental or associational rights. The State, however, grossly overstates the significance of its only real authority for this proposition, *Roberts v. United States Jaycees*, 104 S.Ct. 3244, 3254 (1984). A number of material

[10] This Court's decision in *Norwood v. Harrison*, 413 U.S. 455, 457-458, 461-463 (1973) is distinguishable for the same reason. The limitation on governmental financial largesse does not forbid the observance of a religious tenet. This Court's decision in *Runyon v. McCrary*, 427 U.S. 160 (1976) also does not support application of the sex discrimination statute because *Runyon* did not involve the question of restriction of the ability to observe a religious tenet. *See* 427 U.S. 167 n.6.

distinctions exist between *Roberts* and the instant case. First, *Roberts* involved no interference with religiously based observances which are constitutionally protected free exercise of religion. Second, *Roberts* did not involve the serious impairment of any of the significant expressive associational or religious interests found in this case. The pervasively religious employment relationship involved here is, of necessity, much more selective and exclusive than the largely unselective membership in the Jaycees.[11] Even more importantly, admission of women to the Jaycees did not involve interference with employment responsibilities and an employment relationship central to the effective exercise of third-party rights of free exercise of religion, direction of children's education and expressive association. By contrast, direct interference with religiously motivated action in a pervasively sectarian employment relationship will have significant adverse effects upon free exercise of religion and parental rights to employ teachers who will transmit unswervingly the school's religious message. Finally, this case does not involve the simple denial of access to job opportunities to all women, but deals with a question of behavior which the school finds religiously offensive. In this connection the *Roberts* court specifically noted that its decision did not involve legislation imposing "restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." 104 S.Ct. at 3254. While the state interest in eradicating sex discrimination was sufficiently compelling to overcome the weak set of constitutional liberties at stake in *Roberts*, these interests are less compelling in this case and are certainly not sufficient to overcome the much more significant free exercise, associational and parental interests at stake here. The interests of Dayton Christian Schools and the parents of the Schools' students, together with the interests of the entire religious community, require that the State's sex discrimination statute not be applied to Dayton Christian Schools.

[11] *Compare, Roberts*, 104 S.Ct. at 3251, 3254.

CONCLUSION

The appeal should be denied.

Respectfully submitted,

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FEBRUARY 5, 1996

MOTION

MOTION FILED
AUG 10 1986

No. 85-488

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal from the United States Court
of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF FOR DAYTON CHRISTIAN SCHOOLS, INC., *et al.*

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MOTION OF DAYTON CHRISTIAN SCHOOLS, INC., *et al.*, FOR LEAVE TO FILE POST-ARGUMENT BRIEF

Pursuant to Rule 35.6 of the Rules of the Supreme Court, appellees Dayton Christian Schools, Inc., *et al.*, move for leave to file the attached brief. In support of this motion movants state as follows:

1. Upon oral argument, two unanticipated questions were raised from the bench. In his response to one question counsel for appellees unintentionally misstated a material fact respecting application of DCS's dispute resolution doctrine to emergency situations. The other question from the bench pertained in part to evidence, relating to *Pullman* abstention, cited for the first time in appellants' Reply Brief and which had not been addressed in sufficient detail by either party.

2. Both questions appeared of high importance to the justices raising them. The two matters are indeed of critical importance in this litigation, and it would be extremely unfortunate were the Court to proceed to final disposition of this case in the absence of light which can be shed upon them.

Wherefore, movants respectfully request that their motion for leave to file the attached post-argument brief be granted. This motion is being filed promptly following the first availability to appellees of the transcript of oral argument.

Respectfully submitted,

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Philip J. Murren
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No. 85-488

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

OHIO CIVIL RIGHTS COMMISSION, *et al.*,
Appellants,

v.

DAYTON CHRISTIAN SCHOOLS, INC., *et al.*,
Appellees.

On Appeal from the United States Court
of Appeals for the Sixth Circuit

POST-ARGUMENT BRIEF FOR DAYTON CHRISTIAN SCHOOLS, INC., *et al.*

I. A Ruling That DCS, Based on Its Dispute Resolution Doctrine, May Lawfully Discharge A Teacher Who Complains of Discrimination Sets No Precedent Sanctioning The Discharge of Employees of Religious Institutions Who Would Report Situations Therein Pertaining To Such Emergencies As Child Abuse, Rape, Drug Use, or Other Crime or Fire and Safety Situations.

A. The Scriptural Doctrine: What It Covers And What It Does Not Cover. Upon oral argument, several questions were asked of counsel for appellees concerning implications of the Scriptural dispute resolution doctrine held by Dayton Christian Schools (and, as *amici* briefs show, by a number of other religious bodies). Does it, for example, mean that an employee of an institution

professing such doctrine would be immediately discharged for having reported to the public authority an instance of child abuse, or rape, or drug use, or fire or safety danger? The transcript of oral argument in this Court shows that the responses to those questions by counsel for appellees (made without reference to the record) unintentionally misstated a material fact.

The religious precept at issue pertains solely to (a) going *outside the body of believers* (or to the law), (b) by a *member of the faith community*, (c) seeking resolution by a *non-believer* of a dispute between fellow Christians. This is what DCS considers the doctrine to be, as the Brief For Appellees makes clear, citing, at Page 5, 1 Corinthians 6:1-8 as its authority. (See Appendix, a-1). As the District Court noted (A. 60), this monition against "going outside" is to be read in connection with the teaching of Matthew 18:15-17 (cited in Brief For Appellees, 3 n. 2) which requires effort "inside" by the body of believers to resolve grievances between Christians. The 1 Corinthians doctrine does *not* speak of discharging from employment one who violates it (or of excommunicating such person or disassociating such person from the body of believers). Such separation of the erring member is a matter entirely separate from the 1 Corinthians precept and is considered *infra* at Pages 5-7. Neither does the doctrine cover complaining to the public authority of the actions of one not a brother Christian — an intruder, for example, who is not of the faith. Further, it does not bar the institution itself from carrying out any common civic duty to complain to, or report to, public authority.

What, however, of *emergency* situations? Suppose that a teacher at DCS should observe another teacher engaged in abusing a child. Because no such issue is involved in this litigation, and because nothing in the record shows DCS to have ever encountered an instance of child abuse or the commission of crime by its employees (who are selected with meticulous care for their

moral character (J.A. 17, 27-55, 59-61; Tr. 41, 50)), or to have ever suppressed the reporting of the same, evidence was not introduced at trial — by either party — with respect to this or any other emergency situation.

The Brief For Appellees, at Page 30, had, however, carefully stated:

> ". . ., there is an obvious distinction to be made between a statute which requires a teacher to report, for example, child abuse (under the Child Abuse Law cited by the State (Br. a-1, *et seq.*)) and a statute such as the Ohio Civil Rights Act which places no duty upon a teacher to report discrimination. *The societal interest in the employee's reporting in the first situation is manifestly a different and greater interest than the interest in the second situation* (which encompasses cases, such as the present case, where a teacher has attempted to get the State to act on her behalf in a *personal doctrinal dispute with her employer*)." (Emphasis supplied).

B. The Scriptural Precept Does Not Bar The Reporting By DCS Or Its Personnel of Child Abuse, Rape or Other Crime. If It Did, A Compelling State Interest Would Justify Overriding That Bar In Any Situation of Threatened Grave Immediate Harm. Upon questioning on this matter, counsel for appellees said that there could be situations in which the Matthew 18 doctrine should be held to prevail over a requirement that a teacher report an instance of child abuse immediately to the public authority (Transcript of Oral Argument, 36), but that where the matter was criminal, this would not be so (*id.* at 36-38). The record establishes that the *ordinary* procedure enjoined upon DCS personnel, in situations where an employee desires to complain of deemed misconduct of another (or by DCS itself) is to take the matter up, first, with the allegedly offending party, and only then to move the issue to the faith community, and not to first take it outside. Nothing in the record supports the

presumption that that doctrine would forbid a DCS employee to call the fire department if fire threatens, or the police in case of burglary. Nor does the record support the presumption that if a member of the DCS faith presented a threat of immediate harm to anyone, through child abuse, rape or other crime, another member could not, for religious reasons, and would not, out of common sense and civic duty, likewise promptly call the public authorities. The record shows DCS to be, not an obscurantist cult, but a school long established in the Dayton community and having excellent rapport with a large clientele of parents. (Tr. 81-120; Pl. Ex. 7). It would be difficult to describe a school more scrupulously devoted to the inculcating of principles of good citizenship (see Teacher's Manual (J.A. 27-55)), and it would be anomalous to say that the personnel of such a school are bound by its doctrine to flout the child protection and criminal laws of the state.

If the Court nevertheless were to conclude that the practice of the dispute doctrine would deter DCS employees from observing the requirement of the Ohio Child Abuse Act (see Brief For Appellants, a-1) that such employees immediately report any instance of child abuse[1], or any other situation threatening immediate harm to anyone, the Court could (and should) require

1. Note, however, that the Ohio Child Abuse Act contemplates that the reporting requirement is satisfied either by direct reports *or* by "caus[ing] reports to be made" to the relevant authorities. Ohio Rev. Code §2151.421 (Page, 1984 Supp.) cited in Brief For Appellants, a-1. Thus Ohio law does not preclude a school policy which requires that teachers make reports of suspected child abuse to the school authorities for transmittal to the public authorities. See also the analogous provision of the Pennsylvania Child Protective Services Law, Pa. Stat. Ann., Title 11, §2204(b) (Purdon Supp. 1985) which *requires* teachers to report to their principal, who then reports to the State. And see, *Pennsylvania State Education Association v. Commonwealth* , 449 A.2d 89, 68 Pa. Cmwlth. 279 (1982) (acts by school teachers not subject to reporting requirement).

the right of such practice to be subordinated to a compelling state interest in preventing such harm See *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). Child abuse is frequently — perhaps always — an emergency situation.

Utterly different is the situation presented in the present case where nothing comparable to any situation of child abuse, rape or imminent commission of crime exists[2], but, instead, a dispute over a religious doctrine[3] — namely, that concerning the role of the mother of an infant. No immediate harm to anyone was threatened by the restraint upon Mrs. Hoskinson posed by the internal resolution requirement. The suppression of observance of that requirement in this case would therefore be unjustified. Hence it is essential that, while the Court is considering possible implications of the doctrine in unusual situations, it also consider the harmful implications — reaching far beyond DCS — of suppressing the doctrine's application in situations where it is *ordinarily* employed to protect the automony, doctrine, integrity and self-governance of religious bodies.

C. DCS Has The Right to Discharge a Member Who Violates The Doctrine By Carrying A Matter Outside The Body of Believers Not Involving a Threat Of Grave and Immediate Harm. DCS and the American Jewish Committee, Orthodox Jewish organizations, the United

2. So, too, with the question posed on oral argument with respect to a hypothetical religious institution which — not commercial (*cf.* , *Tony & Susan Alamo Foundation v. Secretary of Labor* , ——U.S.——, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985)) but more akin to religious orders enjoining a vow of poverty — had a doctrine rejecting compliance with minimum wage laws. Such a case, if ever it would arise, is best left to the full litigation process wherein a complete record, fully relevant to the unique circumstances there presented, could be developed.

3. Indeed the State describes that doctrine as "a *religious* philosophy that was inherently discriminatory towards women." Reply Brief, 6. (Emphasis supplied).

States Catholic Conference, the Conference of Seventh-day Adventists and other religious bodies filing briefs *amicus curiae* herein, in support of DCS, unanimously insist upon the liberty of religious bodies (a) to require their members to resolve doctrinal disputes among themselves and (b) to disassociate those who reject their religious teachings. Thereby these religious organizations but assert what this Court has been stating for more than a century, namely, that it is "of the essence" of voluntary religious associations to be able to exercise "their right to establish tribunals for the decision of questions arising among themselves", which decisions "should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for". *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-729 (1872). Indeed, the Court, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 715 (1976), went further to state that "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance."

DCS does not insist upon so broad a statement of its rights herein. It takes those statements to apply to all *ordinary* situations of ecclesiastical discipline. Clearly there is a right, in such situations, to excommunicate, disassociate, separate — or discharge — the member who rejects essential teachings. This is plainly not, however, a mere "rule of discipline" but forms part of the matrix of the faith community, essential to its identity, integrity and preservation.

As noted, the 1 Corinthians doctrine does *not* call for the discharge (or other form of separation) of any employee. To the contrary, it is required to be invoked simultaneously with Matthew 18, which *imposes* a reconciliation procedure. (See Brief For Appellees, 3-4). Mrs. Hoskinson was not "automatically fired" in 1979,

any more than she had been in 1977 (when the conciliation process had also been involved and had succeeded). (*Id.* at 4-5). In the present instance of her breach of doctrine and contract DCS *twice* sought conciliation with her before discharging her. (*Id.* at 6). Her discharge was precipitated by her going "outside" to an attorney, but was caused by her refusal to abide by the reconciliation process. (Tr. 68; A. 65, A. 101-102).

II. Neither *Younger* Nor *Pullman* Abstention Should Have Been Observed By The District Court.[4]

Younger abstention would have been inappropriate. The State, in its two briefs, failed to disclose to the Court that it had initially urged abstention by the District Court and had then submitted itself to District Court jurisdiction. It was the Brief For Appellees which first brought this to the attention of the Court. (Brief For Appellees, 11). Counsel for the State, upon oral argument, told the Supreme Court: "The District Court in its *opinion* never addressed the abstention issue." (Transcript of Oral Argument, 7, emphasis supplied). But in its Final Pretrial Order the District Court had indeed addressed that issue, stating: "The jurisdiction of the Court is not disputed." (J.A. 127). Not only was the jurisdiction not disputed by the State; it was never mentioned in the Jurisdictional Statement, and the State's brief failed to so much as mention possible *Younger* or *Pullman* abstention issues. In spite of representations by the State, upon oral argument, that "abstention would have been a proper remedy for the District Court to have followed" and that this would have been the preferable route (Transcript of Oral Argument, 8), the State, throughout the years of this case, and down to the moment of oral argument, appeared in hot pursuit of utilizing this case to establish a national precedent limiting the liberty of religious bodies

4. *Younger v. Harris* , 401 U.S. 37 (1971); *Railroad Commission v. Pullman Co.* , 312 U.S. 496 (1974).

to exercise long-standing Scripturally founded beliefs relating to gender and familial role.[5]

Pullman abstention would likewise have been improper. In its Reply Brief, the State attempts to create the impression that it is free to administer the Act with liberality where religious interests are presented, here stating that (i) it can grant advance bona fide occupational qualification certificates so as to permit religious bodies to hire co-religionists (Reply Brief, 5) and, more broadly, (ii) that it "can and has considered religious justifications for employment decisions even in situations where a bona fide occupational qualification is not sought in advance." *Ibid.*

(i) BFOQ Certification. The State misrepresents the BFOQ provisions of the Act. The Court is respectfully referred to the text of Section 4112.02(E) of the Act, which sets forth the particular activities for which BFOQ certification is permitted. These statutory provisions do *not* include hiring or firing, but are limited to such matters as information-seeking, record-keeping and advertising. Under the statute DCS could *not* have gotten a BFOQ to allow it to observe its doctrine respecting mothers — which observance the State anyhow says is based on "a religious philosophy inherently discriminatory towards women." (Reply Brief, 6). Additionally, the regulations under the Act, Section 4112-5-02(D), actually so define BFOQ as to confine it to situations of *sex* discrimination and then only where based upon "physical characteristics". Hence the whole point of the State's in-

5. As counsel for appellees, upon oral argument (Transcript of Oral Argument, 28-32), and the Brief For Appellees (at Pages 17-19) attempted to make clear, DCS's proceeding in the state system would have been not only futile but severely damaging, since, under the peculiar terms of the Ohio Civil Rights Act, the Commission would have *had* to find DCS guilty of unlawful discrimination and the Court of Common Pleas was barred from *de novo* review.

dicating its religious liberality is irrelevant.[6] Indeed, as counsel for appellants admitted on oral argument, no BFOQ certification could be obtained by DCS respecting either of its challenged religious practices. (Transcript of Oral Argument, 5-6).

(ii) "Religious justification". The State's Reply Brief, in support of its statement to the Court that it "can and has considered religious justifications for employment decisions" even where a BFOQ certificate has not been sought, cites "*In The Matter of St. Mary of the Falls*, Complaint No. 948"; "*In The Matter of Saint Michael's*, Complaint No. 2726" and "*Menz v. St. Pius School*, Complaint No. 3823". (Reply Brief, 6). The *St. Mary of the Falls* item proves to be, not a decided case, but a "Report of the Hearing Examiner". The *Saint Michael's* item proves to be an "Interoffice Memorandum" of the Office of the Attorney General. The *St. Pius School* item is found simply in "Minutes of the Ohio Civil Rights Commission, November 15, 1983". Thus the State — not at the administrative stage, not upon the trial, not by reference in its Jurisdictional Statement, not in Brief for Appellants, but only at the Reply Brief stage — presents *evidence* to this Court in a transparent attempt to persuade the Court that the Ohio Civil Rights Act really allows the Ohio Civil Rights Commission broad discretion in application of the Act in religious situations.

While appellees protest this completely improper endeavor by the State (see *Hopt v. Utah*, 114 U.S. 488, 491-492 (1885)), the State's claim of liberality not only

6. The State's reason for so indicating has actually nothing to do with DCS. Rather, it is to rebut DCS's arguments respecting the impact upon *other* religious groups of a decision suppressing the religious practices of DCS herein. In any event, the State's surprising proposition that a religious body would have to go to the State to get advance governmental permission to hire its own co-religionists, not merely rests upon an unconstitutional prior restraint but is a thoroughly novel aberration.

fails to rebut DCS's claim respecting the broad adverse effect which a reversal herein would have on other religious bodies but is utterly irrelvant to DCS.[7] However, an additional point re *Pullman* abstention needs to be stressed:

No "religious justifications" are possible under the terms of the Ohio Civil Rights Act, the relevant wording of which (Section 4112.02) is:

> "It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person . . ."

Irrespective of the claim by the State to religious liberality made in its Reply Brief, upon oral argument counsel for the State specifically emphasized that religious beliefs which are "inherently sexually discriminatory" can never be used as a defense. (Transcript of Oral Argument, 20).

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7. The State also attempts this rebuttal in another way. Seeking to evade appellees' argument that the Act could be used to "require the Roman Catholic Church to ordain women or Hasidic congregations to accept women rabbis", the State's Reply Brief sets up the fiction that these — or Yeshiva academies, for example, — are "purely ecclesiastical" institutions, while DCS is not. (Reply Brief, 4-5). The constitutional question, of course, is not whether DCS is "ecclesiastical" but whether it is religious. The District Court found it to be pervasively and distinctly so (A. 58), and the State did not cross-appeal that finding. The Supreme Court has long since refused to countenance the notion that such schools can be compartmentalized into a "secular" side and a "purely theological" side. See *Lemon v. Kurtzman* , 403 U.S. 602, 616-619 (1971) and related cases cited at Brief For Appellees, 14-15. Further, it may be noted, the State misrepresents the record when it asserts that DCS is state-aided (Reply Brief, n. 1; compare with J.A. 110, Tr. 37).

The Supreme Court of Ohio has held that "just cause" is not an issue in an action alleging discrimination, *i.e.*, a discriminatory act can never be "just cause" for discrimination on account of sex, race, etc. *Plumbers & Steamfitters Committee v. Ohio Civil Rights Commission*, 66 Ohio St.2d 192, 199, 421 N.E.2d 128, 135 (1982) and see *Barker v. Scoville, Inc.*, 6 Ohio St.2d 146, 150, 451 N.E.2d 807, 811 (1983). As the State acknowledges, any accommodation for religious institutions comes *in spite of* the Act ("since the *Constitution* itself restrains the State from taking action to limit religious discrimination" (Brief For Appellants, 27, emphasis supplied)), rather than *because of* the Act. Determination that the express terms of the Act must give way due to their repugnance to the *federal* Constitution is not the particular reserve of the *state* court system, to the defeat of federal court review.[8]

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8. Whatever form the *penalty* ultimately chosen by the State herein may have taken, it was not necessary for DCS to delay its federal court action until that penalty was imposed. It was a certainty, as the State has conceded, that DCS was in violation of the Act, and that its violation (due solely to pursuit of a religious belief) would result in punitive action by the State.

The District Court and Court of Appeals, therefore, were correct, irrespective of *Younger* or *Pullman* considerations, in assuming jurisdiction, proceeding with trial of the issues and coming to a judgment.

Respectfully submitted,

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CHAPTER 6

Dare any of you, having a matter against another, go to law before the unjust, and not before the saints?

2 Do ye not know that the saints shall judge the world? and if the world shall be judged by you, are ye unworthy to judge the smallest matters?

3 Know ye not that we shall judge angels? how much more things that pertain to this life?

4 If then ye have judgments of things pertaining to this life, set them to judge who are least esteemed in the church.

5 I speak to your shame. Is it so, that there is not a wise man among you? no, not one that shall be able to judge between his brethren?

6 But brother goeth to law with brother, and that before the unbelievers.

7 Now therefore there is utterly a fault among you, because ye go to law one with another. Why do ye not rather take wrong? why do ye not rather *suffer yourselves to* be defrauded?

8 Nay, ye do wrong, and defraud, and that *your* brethren.

King James version